APPENDIX

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
Appellant

—*v.*—

STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT FILED MAY 27, 1975
PROBABLE JURISDICTION NOTED OCTOBER 6, 1975

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[1] The opinion, judgment, and first amended judgment of the district court are reproduced as Appendices A, B, and D, respectively, of the Jurisdictional Statement. The appellant's notice of appeal and supplemental notice of appeal are reproduced as Appendices C and E, respectively, of the Jurisdictional Statement.

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DOCKET ENTRIES

DATE

3-4-74 Complaint for injunctive and declaratory relief; JS-5 to Order convening of three-judge court.

Summons, original and five copies, issued and delivered to Marshal for service.

3-11-74 Amendment to Complaint. Original and three copies. Copies lodged in file.

3-15-74 Marshal's return of service on Victor R. Ortega, U.S. Attorney, on 3-7-74.

3-15-74 Marshal's return of service on Attorney General of the United States by certified mail and on the Secretary of the Interior of the United States also by certified mail on 3-7-74.

3-15-74 Plaintiffs' Motion to dismiss certain defendant.

Order that defendant Victor R. Ortega, U.S. Attorney, is dismissed from action. (MECHEM) Copies mailed to counsel.

3-19-74 Defendants' Response to Motion to Dismiss.

4-3-74 Order that the action is to be heard and determined by a three-judge court to be constituted as follows: Judge Oliver Seth, Judge H. Vearle Payne, and Judge Edwin L. Mechem. (DAVID T. LEWIS) Copies of all pleadings and order forwarded to Judge Seth and Judge Mechem. Copy of order forwarded to Judge Payne.

4-11-74 Set for Hearing (3 Judges) on May 3, 1974, at 1:30 P.M.

4-25-74 Defendants' Motion to Vacate Hearing of May 3, 1974.

Order that the hearing in this action scheduled for May 3, 1974 is vacated (PAYNE)

Copies of Order sent to counsel.

Copies of above motion and order sent to three judges.

DATE

4-25-74 3 Judge Hearing (5-3-74) vacated.

5-3-74 Defendants' Motion for extension of time of 15 days from May 6, 1974 to answer complaint. Copies sent to 3 Judges.

Order granting above motion. (PAYNE). Copies sent counsel and to three Judges.

5-20-74 Defendants' Answer. Copies sent to all three judges.

8-3-74 Set for Non-Jury trial 9-30-74. Notice given.

9-30-74 Albuquerque: Three Judge Court, Seth, Payne and Mechem/H. Henry, reporter. 3:38 P.M. called for Hearing. George Harris appears for Plaintiff and Jim Grant, Assistant U. S. Attorney, for Defendants. Opening Statements waived. Plaintiff calls witness Garner to which Defendant objects stating matter to be heard on arguments only. OVERRULED. Case proceeds as *non-jury trial.* Plaintiff's evidence presented. Witnesses sworn; 4:56 P.M. Plaintiff rests, defendant presents no evidence and moves to dismiss. Plaintiff reopens. Witness sworn. 5:03 P.M. evidence concluded. Plaintiff files Memorandum Brief. Defendant renews motion to dismiss or in the alternative ro remand case to original assigned judge—taken under advisement. Defendant to file Brief in 20 days, and Plaintiff to file Reply Brief in 5 days thereafter. Case taken under advisement. 5:09 P.M. Recess.

Plaintiffs' Exhibit 1 through 12.

Defendants' Exhibits A and C.

Plaintiffs' Memorandum Brief.

10-16-74 Plaintiffs' Supplemental Trial Brief. Copies sent to Three Judges.

Defendant's Motion for extension of time to answer.

Order that the United States of America is granted an extension of time within which to answer until one week from October 20, 1974. (PAYNE)

Copies of Motion and Order sent to three Judges.

DATE

10-29-74 Defendants' Motion to Dismiss, or in the Alternative for summary judgment. Copies sent to three judges.

Memorandum Brief in support of above motion. Copies sent to three judges.

11-8-74 Plaintiffs' Motion for extension of time for one week to November 18, 1974 to respond to defendants' motion and Brief.

11-8-74 Order approving above motion. (PAYNE)

Copies of above motion and order sent to counsel and to three judges.

11-9-74 Plaintiffs' Motion for extension of time to November 20, 1974 to respond to Defendants' Motion and Brief.

Order granting above motion. (PAYNE)

Copies of order sent to counsel. Copies of motion and order sent to three judges.

11-20-74 Plaintiffs' Motion for Summary Judgment.

Affidavit of Lee S. Garner.

Plaintiffs' Reply Brief.

Copies of above sent to three judges.

2-28-75 Court's Memorandum Opinion. Copies sent to counsel.

Judgment that the Wild Free-Roaming Horses and Burros Act, Section 1331 through 1340, Title 16, USC, is declared unconstitutional. Defendants are permanently enjoined from enforcing or executing the operation of the act; and each party to bear its own costs. (SETH, PAYNE & MECHEM)

Copies of above order sent to counsel.

FINAL DOCKET JS 6

3-7-75 Order that the judgment filed on February 28, 1975 is stayed until further order of this Court. (PAYNE, MECHEM. Approved by Judge Seth by phone)

Copies of Order sent to counsel.

Copies of above order sent to three judges.

DATE

3-10-75 Defendant's Motion to Amend or Alter Judgment.

Copies of motion sent to three Judges.

3-18-75 Defendants' Motion to Stay Judgment pending Appeal. Affidavit of James Gabettas and D. Dean Bibles.

Copies of motion sent to three judges.

3-27-75 Plaintiffs Motion to Strike Affidavits. Copies to three judges.

Plaintiffs Response to Defendants' Motion for Stay.

3-28-75 Defendant's Notice of Appeal to the Supreme Court of the United States from Judgment entered 2-28-75.

3-31-75 Order that Victor R. Ortega, United States Attorney for the District of New Mexico, dismissed as a deft. in this cause by order of the Court, filed 3-15-75, be deleted from the caption and the United States of America dismissed for lack of jurisdiction. (SETH, PAYNE & MECHEM)

Copies of Order sent to counsel. Copies sent to three Judges.

First Amended Judgment, changing the caption. (SETH, PAYNE & MECHEM)

Copies sent to counsel. Copies sent to three Judges.

Copies of Notice of Appeal sent to other counsel, copy of Notice of appeal delivered to the Court Reporter, copy of Notice of Appeal and copy of docket entries sent to Supreme Court of the United States, copy of docket entries and form letter sent to U. S. Attorney for the Secretary of the Interior.

3-27-75 Defendants Response to Motion to Strike.

Copies sent to three Judges.

Transcript of Record on Appeal, original only.

Copy of transcript of record on appeal.

4-14-75 Defendants' Supplemental Notice of Appeal to the Supreme Court of the United States.

Copies of supplemental Notice of appeal sent to other counsel, copy mailed to Clerk, Supreme Court of the United States, and copy delivered to the Court Reporter.

DATE

4-15-75 Affidavit of Joe B. Fallini on behalf of Plaintiff.

Affidavit of William P. Beko on behalf of Plaintiff.

Affidavit of Joe B. Fallini, Jr. on behalf of Plaintiff.

Copies of above affidavits sent to three judges.

4-16-75 Plaintiff's Supplemental Response to Defendants' Motion to Stay.

Affidavit of Pat Archuleta.

Affidavit of Roy G. Gibson.

Affidavit of Lee S. Garner.

Copies of Supplemental Response and above three affidavits sent to three judges.

5-8-75 Letter to three Judges requesting oral argument of counsel with regard to defendants' motion to stay. Filed by attorney for pltfs.

Copies sent to three judges.

Copy of letter from Attorney for Plaintiff to the Solicitor General, Dept. of Justice.

7-3-75 Request for Record and Transcript of proceedings to be transmitted to the Supreme Court, by Plaintiffs-Appellees.

Copy sent to the Supreme Court and to the U. S. Attorney.

7-10-75 Record on appeal in two volumes mailed to U. S. Supreme Court, Washington, D. C., by certified mail.

7-18-75 Copy of letter from Supreme Court of the United States acknowledging receipt of the record on appeal in two volumes on 7-14-75.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-127

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

v.

ROGERS C. B. MORTON, Secretary, United States Department of Interior, VICTOR R. ORTEGA, United States Attorney for the District of New Mexico, and THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed March 4, 1974]

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF; TO ORDER CONVENING OF THREE-JUDGE COURT

Plaintiffs, and each of them, hereby and herewith complain for injunction and for declaratory relief as follows:

1. This is a civil action, whereof the United States District Court for the District of New Mexico has original jurisdiction, and is a suit for a declaratory judgment pursuant to the Federal Declaratory Judgment Act of June 14, 1934 (28 U.S.C. 2201), and for injunctive relief, in a case of actual controversy between the Plaintiffs and the Defendants, as more fully hereinafter appears.

2. This action arises under the Constitution of the United States and may be finally adjudicated as between the parties; and the matter in controversy, exclusive of interests and costs, exceeds the sum of $10,000.00; wherefore, this Court is now vested with appropriate jurisdiction and power to declare the rights and legal relations of the parties interested and to grant appropriate equitable relief; and said parties are entitled to such declara-

tion and equitable relief, the same to have the force and effect of a final judgment or decree, and to be reviewable as such.

3. Jurisdiction is conferred upon this Court by Sections 1331, 2282 and 2284 of Title 28, United States Code, in that the Plaintiffs, and each of them, hereby and herewith request the convocation of a three-judge court in order to obtain declaratory relief and interlocutory and permanent injunctions restraining the enforcement, operation or execution of Sections 1331 through 1340 of Title 16, United States Code, and to redress the deprivation under color of Federal Law, of rights, privileges and immunities secured to Plaintiffs and to all persons similarly situated under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution.

4. At all times mentioned herein, the individual Plaintiffs, and each of them, were and now are citizens of the United States and are residents of the State of New Mexico, and within the jurisdiction of the above-entitled Court. The New Mexico State Livestock Board is an agency of the State of New Mexico, created by and operating under the statutes of that state.

5. Defendant Ortego is the duly appointed and acting United States Attorney for the District of New Mexico. In such capacity, he is responsible, inter alia, for the enforcement of the laws of the United States within his jurisdiction and for the prosecution of persons who have committed criminal violations within his jurisdiction. Specifically, he is responsible for the enforcement of Sections 1331 through 1340 of Title 16, United States Code, which Sections are the subject of this action; Defendant Morton is the Secretary of the United States Department of Interior, and as such, is responsible for the operation and execution of the aforementioned United States statutes.

6. On or about the 20th day of January, 1974, Kelley Stephenson, Carrizozo, New Mexico, requested the New Mexico Livestock Board to capture and corral nineteen (19) unbranded and unclaimed burros which had been wandering upon his private property and upon public lands which he was leasing from the Federal Government,

and for which he had obtained federal grazing permits. Said burros were harassing and molesting his cattle, destroying his feed upon both the private land and the grazing permit land, and were otherwise harassing and interfering with Stephenson's ranching operations.

7. Said burros are, and were at all times material hereto, "estrays" within the meaning of the estray law of the State of New Mexico, to-wit: 47-14-1 through 47-14-10, N.M.S.A. (1953 Comp.). The New Mexico State Livestock Board and its director, Lee S. Garner, acting for the State of New Mexico and at the request of Stephenson, impounded said animals and subsequently published notice and sold them at public auction; all pursuant to the estray laws of the State of New Mexico. Plaintiff Foster purchased three of these burros and is presently in possession of them.

8. Notwithstanding the question of illegality of the acts of the Defendants with reference to these specific nineteen (19) burros, other acts, claims and assertions of the Defendants relative to Sections 1331 through 1340 of Title 16, United States Code deprive the Plaintiffs of their aforementioned constitutional rights: To-wit, Defendants' acts concerning jurisdiction and control over unbranded and unclaimed horses and burros, within New Mexico; and Defendants' attempts to restrain the Plaintiffs from implementing the estray laws of the State of New Mexico.

9. The Defendants, through the offices of the United States Attorney Victor Ortega, and the Department of Interior, have asserted and claimed jurisdiction, title, the right to regulate, and the right to possession of said animals, allegedly pursuant to Sections 1331 through 1340 of Title 16, United States Code; and further, the Defendants have demanded that the Plaintiffs cease and desist from further implementing the impoundment and sale procedures authorized by the estray laws of New Mexico. Further, the Defendants demand that said nineteen (19) burros be handed over to the United States, as property of the United States. The plaintiffs state that they intend to continue implementing and acting upon the estray laws of the State of New Mexico, insofar as im-

poundment, ascertaining ownership of and the sale of unclaimed and unbranded horses and burros is concerned, and to do all other acts provided by said estray laws.

10. The burros herein are non-migratory, remaining within the boundaries of the State of New Mexico, and are not involved in, related to, affecting, nor the subject of, interstate commerce. There is no basis upon which the United States may claim or act upon the alleged ownership, jurisdiction over, or regulatory powers concerning said animals; and such acts and claims deprive these Plaintiffs and the citizens of New Mexico of their constitutional rights under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution. These acts also conflict with and violate the estray laws of the State of New Mexico.

11. The State of New Mexico, and the New Mexico State Livestock Board, in its sovereign capacity, and as representative for the citizens of the State of New Mexico, has full regulatory, jurisdictional, and other powers over all non-migratory unbranded and unclaimed horses and burros within its boundaries, where, as in the present action, said animals do not come within the "commerce" powers of the United States, and where, as in this action, said animals are neither destroying nor otherwise molesting federal lands. The acts, claims and assertions of the Defendants herein clearly constitute a violation of the aforementioned constitutional rights and powers of the State of New Mexico, the State Livestock Board, the citizens of New Mexico, and the individual Plaintiffs, and these acts, claims and assertions of the Defendants herein illegally prevent the New Mexico State Livestock Board from performing its legal duties and obligations under the estray laws of the State of New Mexico.

12. Specifically, the Defendants, by their acts, claims and assertions herein, attempt to exercise powers not delegated to the United States by the Constitution of the United States and which powers are reserved to the people and to the states by the Ninth and Tenth Amendments to the Constitution of the United States and, also, Defendants thereby deprive the Plaintiffs and the citizens of the State of New Mexico of property without

due process of law, and confiscate property without just compensation, in violation of the Fourth and Fifth Amendments to the United States Constitution, also, Defendants' acts, claims, and assertions deprive the Plaintiffs of their individual and state's rights under the Constitution of the United States to implement the estray laws of the State of New Mexico.

13. For the reasons stated above, Sections 1331 through 1340 of Title 16, United States Code, are unconstitutional on their face and as applied.

14. Plaintiffs are informed and believe and Defendants have expressly asserted that the Defendants will, unless restrained by this honorable Court, continue to do acts similar to those described hereinabove, with regard to the enforcement and operation of the aforementioned federal statutes, the confiscation of animals, destruction of private property, and deprivation of property without due process of law; and the Plaintiffs have suffered and will suffer irreparable injury unless said acts are restrained by this Court. The Plaintiffs have no adequate remedy at law, for the reason that innumerable actions would have to be brought at this time, and hereafter, upon each such act by Defendants, and, because the damages arising from Defendants' actions, including confiscation of animals, damage to private property, and the attempted annulment of the estray laws of New Mexico, cannot reasonably be ascertained or measured.

WHEREFORE, Plaintiffs pray for the judgment of this Court declaring:

A. That Sections 1331 through 1340 of Title 16, United States Code, are void, unconstitutional and ineffective to prevent the Plaintiffs and others similarly situated from exercising their rights, duties, powers and obligations under the United States Constitution and under the estray laws of the State of New Mexico; and otherwise prevent Plaintiffs from exercising their constitutional rights of ownership, jurisdiction and regulation concerning unbranded and unclaimed horses and burros within the boundaries of the State of New Mexico.

B. That the Court grant a permanent and final injunction restraining and enjoining the Defendants from enforcing, executing or causing the operation of Sections 1331 through 1340 of Title 16, United States Code, and that pending the final determination of this cause, a preliminary injunction issue restraining Defendants from said acts.

PLAINTIFFS COMPLAIN OF DEFENDANTS AS A SECOND AND DISTINCT CAUSE OF ACTION AS FOLLOWS:

15. Plaintiffs incorporate herein paragraphs 1 through 12 and paragraph 14 of the First Cause of Action as though set forth at length herein.

16. The Defendants, by their acts hereinabove described, are executing, operating, enforcing, interpreting and applying Sections 1331 through 1340 of Title 16, United States Code, so as to violate the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution, in that Section 1335 of Title 16, United States Code, recognizes the validity and legality of the estray laws of the State of New Mexico and the validity and legality of the acts of the New Mexico State Livestock Board in performing its duties under said estray laws. The New Mexico estray laws and the acts of the New Mexico State Livestock Board do not, therefore, conflict with, contradict, nor interfere with the operation of Sections 1331 through 1340 of Title 16, United States Code.

WHEREFORE, Plaintiffs pray for the judgment of this Court, declaring:

A. That the estray laws of the State of New Mexico, to-wit: 47-14-1 through 47-14-10, N.M.S.A. (1953 Comp.), comply with the Constitution and Statutes of the United States, and specifically, do not conflict with, contradict, nor interfere with the operation, execution or enforcement of Sections 1331 through 1340 of Title 16, United States Code.

B. That Section 1335 of Title 16, United States Code, be interpreted by this Court so as to allow and provide for the continuing operation and validity of the aforementioned estray laws of the State of New Mexico and that, therefore, the aforementioned activities and performance of duties by the New Mexico State Livestock Board, acting for the State of New Mexico under its estray laws, do not constitute a violation of Sections 1331 through 1340 of Title 16, United States Code.

C. That the Court grant a preliminary injunction and final injunction against the Defendants restraining and enjoining said Defendants from confiscating said animals under Sections 1331 through 1340 of Title 16, United States Code, and from otherwise applying the aforesaid Federal Statutes in a manner which would be inconsistent with the operation or execution of the estray laws of the State of New Mexico or in derogation of the rights of the Plaintiffs and the citizens of New Mexico under said state statutes or under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution.

MODRALL SPERLING ROEHL HARRIS & SISK

By _____

Attorneys for plaintiffs
800 Public Service Building
P.O. Box 2168
Albuquerque, New Mexico 87103

[Caption omitted; filed March 11, 1974]

AMENDMENT TO COMPLAINT

Plaintiffs, and each of them, hereby and herewith amend the previously filed Complaint in the above cause for injunctive and declaratory relief, by adding thereto the following:

1. The title of the Complaint is amended to read as follows: "COMPLAINT FOR VIOLATION OF CIVIL RIGHTS; FOR INJUNCTIVE AND DECLARATORY RELIEF; TO ORDER CONVENING OF THREE-JUDGE COURT".

2. Paragraph 3 of the Plaintiffs' Complaint is amended to read as follows: "Jurisdiction is conferred upon this Court by Sections 1331, 1343, 2282 and 2284 of Title 28, United States Code, and by Sections 1983 and 1985 of Title 42, United States Code, in that the Plaintiffs, and each of them, hereby and herewith request the convocation of a three-judge court in order to obtain declaratory relief and interlocutory and permanent injunctions restraining the enforcement, operation or execution of Sections 1331 through 1340 of Title 16, United States Code, and to redress the deprivation under color of Federal Law, of rights, privileges and immunities secured to Plaintiffs and to all persons similarly situated under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution."

3. Paragraph 8 of the Plaintiffs' Complaint is amended to read as follows: "Notwithstanding the question of illegality of the acts of the Defendants with reference to these specific nineteen (19) burros, other acts, claims and assertions of the Defendants relative to Sections 1331 through 1340 of Title 16, United States Code, deprive the Plaintiffs of their aforementioned rights under the Constitution and statutes of the United States. To-wit, Defendants' acts, claims and assertions concerning jurisdiction, control and ownership over all unbranded and unclaimed horses and burros within New Mexico; and, Defendants' attempts and intent to restrain the Plain-

tiffs from implementing the estray laws of the State of New Mexico."

4. Paragraph 10 of the Plaintiffs' Complaint is amended to read as follows: "The burros herein, and all other unbranded and unclaimed horses and burros within New Mexico are non-migratory, remaining within the boundaries of the State of New Mexico, and are not involved in, related to, affecting, nor the subject of, interstate commerce. There is no basis upon which the United States or other Defendants may claim or act upon the alleged ownership, jurisdiction over, or regulatory powers concerning said animals; such acts, claims and assertions deprive these Plaintiffs and the citizens of New Mexico of their rights under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution, and under Sections 1983 and 1985 of Title 42, United States Code. These acts, claims and assertions of the Defendants also conflict with and violate the estray laws of the State of New Mexico."

5. Paragraph 11 of the Plaintiffs' Complaint is amended to read as follows: "The New Mexico State Livestock Board and the State of New Mexico, in its sovereign capacity, and as representative for the citizens of the State of New Mexico, have full regulatory, jurisdictional, and other powers over all non-migratory, unbranded and unclaimed horses and burros within its boundaries, where, said animals do not come within the 'commerce' powers of the United States, and where, said animals are neither destroying nor otherwise molesting federal lands. Therefore, the acts, claims and assertions of the Defendants herein clearly violate the aforementioned rights and powers of the State of New Mexico, the State Livestock Board, the citizens of New Mexico, and the individual Plaintiffs under the aforementioned constitutional and statutory provisions of the United States. Furthermore, these acts, claims and assertions of the Defendants illegally prevent the New Mexico State Livestock Board and the State of New Mexico from performing its legal duties and obligations under the estray laws of the State of New Mexico."

6. Paragraph 12 of the Plaintiffs' Complaint is amended to read as follows: "Specifically, the Defendants, by their acts, claims and assertions herein, attempt to exercise powers not delegated to the United States by the Constitution of the United States and which powers are reserved to the people and to the states by the Ninth and Tenth Amendments to the Constitution of the United States and, also, Defendants deprive the Plaintiffs and the citizens of the State of New Mexico of property without due process of law, and confiscate property without just compensation, in violation of the Fourth and Fifth Amendments to the United States Constitution; also, Defendants' acts, claims and assertions deprive the Plaintiffs of their individual and state rights under the Constitution of the United States to implement the estray laws of the State of New Mexico, and violate Sections 1983 and 1985 of Title 42, United States Code."

7. Paragraph 16 of the Plaintiffs' Complaint is amended to read as follows: "The Defendants, by their acts hereinabove described, are executing, operating, enforcing, interpreting and applying Sections 1331 through 1340 of Title 16, United States Code, so as to violate Sections 1983 and 1985 of Title 42, United States Code, and in violation of the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution, in that Section 1335 of Title 16, United States Code, recognizes the validity and legality of the estray laws of the State of New Mexico and the validity and legality of the acts of the New Mexico State Livestock Board in performing its duty under said estray laws. The New Mexico estray laws and the acts of the New Mexico State Livestock Board do not, therefore, conflict with, contradict, nor interfere with the operation of Sections 1331 through 1340 of Title 16, United States Code."

8. Plaintiffs hereby and herewith reallege, restate and incorporate herein all other paragraphs and prayers for

relief in the original Complaint which are not specifically herein amended.

MODRALL SPERLING ROEHL HARRIS
& SISK

By /s/ George J. Hopkins
Attorneys for Plaintiffs
P. O. Box 2168
Albuquerque, New Mexico 87103

[Caption omitted; filed May 20, 1974]

ANSWER

Come now the defendants, Rogers C. B. Morton, Secretary, United States Department of Interior and the United States of America, by their attorneys, Victor R. Ortega, United States Attorney for the District of New Mexico and James B. Grant, Assistant United States Attorney, and for their answer to plaintiffs' Amended Complaint, state and allege as follows:

FIRST DEFENSE

1. The allegations of paragraphs 1, 2, 3, 8, 11, 12, 13 and 16 of plaintiffs' Complaint consist of conclusions of law which require no answer.

2. Defendants admit the allegations contained in the second sentence of paragraph 4 of the complaint but they are without sufficient information, knowledge or belief as to the allegations contained in the first sentence thereof and therefore deny the same.

3. In answer to the allegations contained in paragraph 5 of the Amended Complaint, defendants admit that defendant Rogers C. B. Morton is the Secretary of the Interior and, as Secretary, is responsible for the operation and execution of the Wild Free-Roaming Horse and Burro Act as it applies to public lands under the jurisdiction of the Department of the Interior. In answer to the allegations concerning "Defendant Ortega", Victor R. Ortega, United States Attorney for the District of New Mexico was dismissed as a defendant in this action by Order of this Court dated March 15, 1974.

4. Defendants are without sufficient knowledge, information or belief as to the allegations contained in paragraph 6 of plaintiffs' complaint and the same are therefore denied.

5. The first sentence and a portion of the second sentence of paragraph 7 of plaintiffs' Complaint contain conclusions of law which require no answer. Defendants are without sufficient knowledge, information or belief

as to the allegations of fact contained in said paragraph 7 and the same are therefore denied.

6. Defendants deny they have claimed title to said nineteen burros; that they demand the burros be handed over to the United States as property of the United States; or that they demand that plaintiffs completely cease and desist from further implementing the impoundment and sale procedures authorized by the estray laws of New Mexico, all as alleged in paragraph 9 of the Complaint. The defendants admit they have asserted the right to regulate said animals and the right to their possession for the purpose of returning said animals to the public domain, pursuant to Sections 1331 through 1340 of Title 16, United States Code.

7. Defendants deny the allegations contained in the first sentence of paragraph 10. The remainder of paragraph 10 contains conclusions of law which require no answer.

8. Defendants admit they will continue to enforce the Wild Free-Roaming Horse and Burro Act but deny they have or will continue to confiscate animals or destroy private property as alleged in paragraph 14 of plaintiffs' complaint. The allegation of deprivation of property without due process of law is a conclusion of law requiring no answer.

9. In answer to paragraph 15 of plaintiffs' complaint, defendants assert and re-allege the answer is contained in paragraph 1 through 8 above.

10. Defendants deny each and every allegation of the Complaint not specifically admitted herein.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The Court is without jurisdiction in this cause and action.

WHEREFORE, defendants pray that this cause and action be dismissed and that defendants recover their costs, and for such other and further relief as the Court deems just and equitable.

VICTOR R. ORTEGA
United States Attorney

By: /s/ James B. Grant
Assistant U.S. Attorney

[Caption omitted; filed October 29, 1974]

MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Come now the defendants, Rogers C. B. Morton and the United States of America, by and through their attorneys, Victor R. Ortega, United States Attorney for the District of New Mexico, and James B. Grant, Assistant United States Attorney and move the court for an Order to dismiss or in the alternative for summary judgment for the following reasons:

(1) Plaintiffs have failed to sustain the burden of proving the allegations of their complaint, either through their evidence or their trial brief.

(2) This Court lacks jurisdiction to grant injunctive relief in this cause and action which is based upon a general threat of enforcement of Federal laws and Regulations.

(3) This Court lacks jurisdiction over the subject matter of this cause and action as the basic issue in dispute is the application of the Supremacy Clause, Article 6, Clause 2 of the United States Constitution.

(4) Defendant is entitled to Summary Judgment in that the Act of December 15, 1971, 85 Stat. 649, 16 USC § 1331 *et seq.*, commonly known as the Wild Free-Roaming Horse and Burro Act, is proper Congressional regulatory legislation protecting a part of the public domain as authorized by the Territorial Clause, Article IV, § 3, Clause 2 of the United States Constitution.

(5) Defendant is entitled to Summary Judgment in that the Act of December 15, 1971, 85 Stat. 649, 16 USC #1331, *et seq.*, commonly known as the Wild Free-Roaming Horse and Burro Act, is proper Congressional regulatory legislation under the Interstate Commerce Clause, Article I, § 8, Clause 3, of the United States Constitution.

In support thereof, Defendant invites the Court's attention to the Memorandum Brief attached hereto.

VICTOR R. ORTEGA
United States Attorney

JAMES B. GRANT
Assistant United States Attorney

[Caption omitted; filed November 20, 1974]

MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, State of New Mexico, New Mexico State Livestock Board, Lee S. Garner, and Claude Foster, by their attorneys, Modrall, Sperling, Roehl, Harris & Sisk, move the Court for summary judgment for the reasons stated in Plaintiffs' trial brief previously filed, and in the attached Reply Brief, and on the ground that:

1. The Plaintiffs, by the witnesses and other evidence introduced by Plaintiffs at trial and by Plaintiffs' briefs, have established the allegations of their Complaint and sustained their burden of proof, and have established a prima facie case entitling them to the relief prayed for; and,

2. The Defendants elected not to introduce any evidence at trial, and failed to rebut or impeach the Plaintiffs' prima facie case; and,

3. The Court has jurisdiction over all of the matters and the parties herein.

The Defendants have moved the Court to dismiss this cause, or in the alternative, for summary judgment in their favor, and in support thereof, the Defendants submitted a Memorandum Brief. At the trial of this cause, this Court permitted the Defendants time to file this Memorandum Brief, and granted Plaintiffs time to file a Reply Brief in response thereto. Therefore, the Plaintiffs submit the attached Reply Brief in response to the Defendants' Memorandum Brief and in support of this Motion for Summary Judgment of the Plaintiffs.

The Plaintiffs' position with regard to many of the points raised in the Defendants' Memorandum Brief is set forth by points and authorities discussed in the Plain-

tiffs' brief previously submitted to the Court in this cause, and those points and authorities will not be reconsidered in the attached Reply Brief.

MODRALL SPERLING ROEHL HARRIS & SISK

By /s/ G. Hopkins
Attorneys for Plaintiffs.
P.O. Box 2168
Albuquerque, New Mexico 87103

TRANSCRIPT OF PROCEEDINGS OF
SEPTEMBER 30, 1974

[2] APPEARANCES

FOR THE PLAINTIFFS:

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Public Service Building
Albuquerque, New Mexico
By: MR. GEORGE T. HARRIS, JR.

FOR THE DEFENDANTS:

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* * * *

JUDGE SETH: We will hear number 127, State of New Mexico. It is against Rogers Morton.

Are the parties ready?

MR. HARRIS: Plaintiffs are ready, Your Honor.

MR. GRANT: Defendants are ready, Your Honor.

JUDGE SETH: You may proceed.

MR. HARRIS: If the Court please, we have four witnesses, all of whom I think will be fairly brief.

Does Your Honor wish an opening statement from either side?

JUDGE SETH: I don't think it will be necessary.

MR. HARRIS: All right. Our first witness is Mr. Lee Garner. May we call him and have him sworn?

MR. GRANT: Your Honor, before we proceed any further, it was our understanding that there would be no [3] evidence taken in this hearing. We came prepared to make legal argument and legal argument only. We have no idea what these witnesses intend to testify, we have not had a pretrial conference, and we have, therefore, no idea what kind of testimony we should have in rebuttal.

JUDGE PAYNE: That's perhaps my fault. I didn't know about any witnesses, and I told them we were just going to argue about the constitutionality of the statutes. I don't know.

JUDGE SETH: Well, let's get the testimony in, and we will see how it looks at that time. I can't imagine it would be too surprising in its contents.

We will hear the witnesses. Call your first witness.

MR. HARRIS: Mr. Garner, would you come forward and be sworn?

LEE S. GARNER

appeared as a witness in his own behalf, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Mr. Garner, would you please state your full name and your address?

[4] A. Lee S. Garner, Albuquerque, New Mexico.

Q. What is your occupation, sir?

A. I am the director of the New Mexico Livestock Board.

Q. What is the New Mexico Livestock Board?

A. It's a regulatory agency of livestock and animals' health, theft, and meat inspection for the State of New Mexico.

Q. How long have you been its executive director?

A. Approximately thirteen years.

Q. State very briefly, please, what your duties are as director.

A. My duties are to manage the affairs of the Board, whose duties are to protect the livestock industry from theft and the spread of animal disease, and protect the public from unwholesome meat and meat food products.

Q. Mr. Garner, we are concerned here in this proceeding with a federal statute entitled Sixteen, sections 1331 through 1340 of the US Code, more commonly known as the Federal Wild Horse Act.

Do you have a familiarity with that federal statute, or those statutes?

A. Yes, sir, fairly well.

Q. Have you had, since the effective date of the statute?

[5] A. Yes, sir.

Q. When did it become effective?

A. It became effective in 1971. The final date for claiming animals was 1973.

Q. Section 1332 of that act, in subsection "B," contains a definition of wild free-roaming horses and burros as being all unbranded and unclaimed horses and burros on public lands of the United States.

You are familiar with that definition?

A. Yes, sir.

Q. Can you state from the experience that you have—well, first, perhaps I better ask you what experience you do have in connection with observing the horse population of the State of New Mexico, and particularly the branded and unbranded animals constituting that population.

A. For the past thirteen years, being director of the New Mexico Livestock Board, I have had very numerous occasions to pick up any stray unbranded horses, burros, and other livestock on all lands, both public and private.

Q. And under what authority have you been picking up stray animals?

A. The New Mexico stray law.

Q. State statute?

A. State statute.

Q. Now, during that thirteen years, on what [6] occasion would you have to pick up, or have your people pick up, a stray animal?

A. When the animals were reported to us by someone, some agency or private individual, as having been on their land or their property, the ownership was unknown. Then they would call us in to determine ownership.

Q. During the course of that thirteen-year period and that experience, have you had occasion to estimate or can you now estimate for the Court here, approximately how many unbranded horses and burros there are in the State of New Mexico, total?

A. Under the Act or just total numbers?

Q. Total number in the whole state on all kinds of lands, federal, state, and fee private lands.

A. My estimate of all horses and burros would be close to a hundred thousand. I would say many of these are in the city and they would not be branded, but the wilder animals, or the animals on—range land animals, I would say at least five thousand.

Q. Unbranded?

A. Unbranded.

Q Out on the range and outside the city metropolitan areas?

A. Right.

Q. And what areas of the state are you talking [7] about? The whole state or only particular places?

A. I am talking about the whole state. I think we have some of these all over the state. We have more in the northern part of the state than any other part.

Q. Can you give the Court some idea as to how, prior to the effective date of the Federal Wild Horse Act, the population of these unbranded unclaimed animals was maintained?

MR. GRANT: Objection, Your Honor. This line is totally irrelevant.

JUDGE SETH: Counsel, I don't see quite the purpose of the questioning.

MR. HARRIS: Your Honor—

JUDGE SETH: You have tried to establish a number of unbranded. Now, what is the purpose?

MR. HARRIS: The purpose is to show what will happen unless these animals are controlled and maintained—

JUDGE SETH: Well, you may proceed.

MR. HARRIS: —in some manner.

JUDGE SETH: You may proceed.

Q. (Mr. Harris continuing) How did you control the population prior to 1971?

A. When we had areas where the population of these horses had increased, the agencies or the private individuals where the animals were running would ask for our assistance in disposing of the animals under our New Mexico laws. They would [8] be trapped and maybe pos-

sibly caught by individuals. We would examine them for ownership. If we could find no ownership, then they would be disposed of, they would be sold at public auction, or on a bid basis.

Q. And what would happen to the proceeds of the sale?

A. The proceeds would be held in our office in escrow for two years for an unknown owner.

Q. And then what happens to it?

A. It goes into the funds of the New Mexico Livestock Board.

Q. Now, from whom would you receive these requests to impound and sell at public auction these animals?

A. From private individuals, from the United States Forest Service, the BLM, the Game Department, the various Indian reservations, and the Park Service.

Q. Mr. Garner, absent some form of population control over this approximately five thousand unbranded, unclaimed horses and burros in the state, can you state for us your opinion as to what is likely and probably—probably is going to happen to the population?

A. In my opinion, if there's no control over the population of these horses, no regulations, I would say that the numbers would double within a three-year period, and again would double in the following three-year period, and so [9] on, unless there was some method taken to control the population.

Q. Do you have some estimate for us as to what we are likely, then, to have by the year 1985?

MR. GRANT: Your Honor—

JUDGE SETH: I think that's irrelevant, Counsel. There's a regulation out and a statute on it. I think that's sufficient reasons for the laws.

Q. Mr. Garner, these several herds around the state that you know of that are unbranded and unclaimed, are they migratory in nature?

MR. GRANT: Now, Your Honor, I don't think there's been a proper foundation laid for this witness's qualification to answer that question. I think the question also presupposes a fact not in evidence in referring to these

horses in herds. There's been no testimony that they run in herds.

MR. HARRIS: If the Court please, I think that goes to the credibility of the witness, and—

JUDGE SETH: I don't know as the witness is a biologist—or perhaps he is; if he is, he hasn't told us. There is no basis laid for his knowledge of the habits of these animals, and also no indication that you are talking about the same ones that are covered by the federal act, either. So I will have to sustain the objection to the question.

[10] Q. Mr. Garner, what has been your experience in connection with checking on the various horse herds in the State of New Mexico, both branded and unbranded? For how long have you been doing it?

A. In my official—in my capacity at this time or—

Q. No, before you became the director of the New Mexico Livestock Board, first.

A. Having been born and raised on a ranch, I have had knowledge of these horses, many different herds, and since having this capacity, I have certainly been very close to knowledge of where they are running, and they do run in herds in most cases.

Q. And has it been a part of your duties to keep track of that sort of thing, as director of the Board?

A. Yes, sir, it has been part of my duties.

Q. And how long have you been engaged in those duties?

A. For thirteen years.

Q. Now, can you state for us whether these herds are migratory or not?

A. They are not.

Q. What do you mean by that, sir?

A. I mean they stay in the same general locality. They don't move hundreds of miles, they stay in the general [11] locality. Possibly a range of no more than thirty to forty miles at the most.

Q. Are you familiar, Mr. Garner, with the statute, federal statute we are talking about and the regulations promulgated under that with respect to the claiming of ownership of these unbranded horses before certain dates?

A. Yes, sir.

Q. What, if anything, did you do on behalf of the state in that connection, Mr. Garner?

A. I wrote a letter to the Bureau of Land Management and to the Forest Service claiming all unbranded horses and mules within the boundary of the State of New Mexico, as strays.

MR. HARRIS: May we have this marked, if the Court please?

(THEREUPON, Plaintiff's Exhibit One was marked for identification.)

Q. Mr. Garner, would you please identify for us Plaintiff's Exhibit One?

A. This is a letter from the Bureau of Land Management, December third, acknowledging my claim as of December fourteenth, as to claiming all the burros and horses, unbranded, in New Mexico.

Q. Addressed to whom?

A. To Lee S. Garner, director, New Mexico Livestock [12] Board.

Q. To whom is it addressed?

A. It is addressed to me.

Q. I am sorry, I gave you the wrong one. Identify Exhibit Two for us first, please.

A. Exhibit Two is a letter to Mr. William Hurst, regional director of the southwest region, United States Forest Service, Albuquerque, New Mexico, and this letter was claiming—

MR. GRANT: Objection, Your Honor. The letter speaks for itself.

Q. By whom was it written?

A. It was written by myself.

Q. And to whom is it addressed?

A. To Mr. William Hurst, regional director of United States Forest Service.

Q. For what purpose was it sent?

A. To claim all the unbranded, unclaimed horses and burros within the boundaries of the State of New Mexico.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit Two.

MR. GRANT: Objection, Your Honor. This letter is addressed to the southwest region of the US Forest Service, Department of Agriculture, and they are not a party to this action. This is the Department of Interior. [13] JUDGE SETH: The letter will be admitted subject to further connection, Counsel.

(THEREUPON, Plaintiff's Exhibit Two was admitted in evidence.)

Q. Please identify for us the Plaintiff's Exhibit Four next, Mr. Garner.

A. It is a letter to Mr. Art Zimmerman, state director of Bureau of Land Management, US Department of Interior, Santa Fe, New Mexico.

Q. Written by whom?

A. By myself.

Q. And for what purpose?

A. Claiming all the unbranded horses and burrors, unbranded, unclaimed horses and burros within the boundaries of the State of New Mexico as strays.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit Four.

MR. GRANT: May I voir dire the witness for just one question, Your Honor?

JUDGE SETH: Yes.

VOIR DIRE EXAMINATION

BY MR. GRANT:

Q. Mr. Garner, was the purpose of this letter marked Plaintiff's Exhibit Four, to terminate a voluntary [14] agreement which you had theretofore been operating under with the Bureau of Land Management?

A. That was one of the purposes.

MR. GRANT: We have no objection.

JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit Four was admitted in evidence.)

JUDGE SETH: I believe you have already identified Plaintiff's Exhibit One as being the Bureau of Land Management's response to you dated December 3rd, 1973, to your November 14th, 1973, letter, have you not?

THE WITNESS: Yes.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit One.

MR. GRANT: No objection.

JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit One was admitted in evidence.)

DIRECT EXAMINATION (Continued)

BY MR. HARRIS:

Q. Would you next identify for us Plaintiff's Exhibit Three?

A. This is a letter from Mr. William Hurst, regional forester, Albuquerque, acknowledging receipt of my [15] letter of claim of all these animals and in addition, also acknowledging my request to terminate a cooperative agreement as signed.

MR. HARRIS: Move the admittance of Plaintiff's Exhibit Three.

MR. GRANT: No objection.

JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit Three was admitted in evidence.)

Q. Mr. Garner, are you acquainted with a New Mexico rancher by the name of Kelley Stephenson?

A. Yes, sir.

Q. Have you had occasion to receive a request from him to pick up burros or horses at any time in the past?

A. Yes, sir, through my office.

Q. And when did that occur, sir, if you recall?

A. The last February, early part of February, February fourth.

Q. Of this year?

A. Of 1974, yes, sir.

Q. And from what area of the state is Mr. Stephenson?

A. Over in the neighborhood of Carrizozo, just south of Carrizozo.

Q. As a result of the request he made upon your Board, what, if any, official action did you take, Mr. Garner?

[16] A. I instructed my assistant, Mr. Owensby, to answer the request and proceed to go over and look the situation over, try to identify the animals, and if they were strays to take the necessary action to impound them and dispose of them under our stray law.

Q. And did he do so?

A. Yes, he did.

Q. Was that part of his duties—

A. Yes, it was.

Q. —before the Board?

A. Yes, sir.

Q. Please identify for us what's been marked as Plaintiff's Exhibit Five.

A. This is a report written by Mr. Fred Owensby, assistant director of New Mexico Livestock Board, as to the stray burros on the Stephenson ranch at Carrizozo, New Mexico, explaining in detail what did happen; that they were gathered and they were disposed of.

Q. Now, are those the burros that are the subject of this lawsuit, or part of this lawsuit?

A. Yes, sir.

Q. Is it a part of Mr. Fred Owensby's duties working for your Board to make reports such as the Plaintiff's Exhibit Five?

A. Yes, sir.

[17] Q. And he did so in this case?

A. Yes, sir.

Q. Was that filed with the Board in your office?

A. Yes, sir.

Q. And is that from your file?

A. This is from my files, yes, sir.

MR. HARRIS: We move the admittance of Plaintiff's Exhibit Five, if the Court please.

Your Honor, I am sorry, I have one other question directed to that exhibit. May I ask it?

JUDGE SETH: Yes.

Q. Was that report made at or shortly after the time of Mr. Owensby's investigation?

A. It was made—it was made during and at the termination of his investigation.

MR. HARRIS: Again, Your Honor, we move its admission in evidence.

JUDGE SETH: May I inquire of Counsel, if Mr. Owensby is here to testify? I understood they would be.

MR. HARRIS: He is here and available, if they desire to call him. We had no intent to call him. We don't think it's necessary. We think we have an official record from the state agency involved, which is both a business record and an official document, and, therefore, receivable in evidence.

[18] MR. GRANT: The report contains nothing but hearsay and we object to it on that ground.

JUDGE SETH: It will be admitted. It's part of the official records.

(THEREUPON, Plaintiff's Exhibit Five was admitted in evidence.)

Q. What happened to the burros, Mr. Garner?

A. They were sold at public auction at the Roswell Livestock Auction in Roswell, New Mexico.

Q. In accordance with the State of New Mexico stray laws?

A. Yes, sir.

MR. GRANT: Objection; leading.

THE WITNESS: Sold under the stray laws of the State of New Mexico.

Q. Has anyone from BLM made any demand upon you as the director of the New Mexico Livestock Board for a return of those animals?

A. There has been a demand made to my office that they be—not be sold, and they be returned to the BLM lands.

Q. Who made that demand of you or upon you, and approximately when was it made.

A. It was made approximately shortly after February eleventh, between February eleventh and February eighteenth. It was made—I believe I am correct in saying from the [19] United States Attorney's office.

Q. Here in Albuquerque?

A. Here in Albuquerque.

Q. All right. Now, again, what was the nature of the demand, to do what?

A. Not to sell the animals and to return them to the BLM lands.

Q. Did you receive any instructions or demands from the US Attorney or anyone with BLM about future impoundments and sales of unbranded horses or burros?

A. Yes. We were told that we were not to impound or sell any more on BLM land.

Q. By whom?

A. By the United States Attorney's office.

Q. At the same time of the other demand?

A. Right.

MR. HARRIS: I believe that's all, Your Honors.

CROSS EXAMINATION

BY MR. GRANT:

Q. Mr. Garner, that was me that called your office, is that—

A. Yes, sir.

Q. —is that the conversation you are talking about?

[20] A. Right.

Q. And did you make a note of the date that that telephone call was made?

A. No, I didn't make a note. I don't—I am sure I have it, but I don't have it here.

Q. If I were to tell you that occurred after the sale, the auction in Roswell, would you have any reason to dispute that?

A. I wouldn't—I would have no reason to dispute it, no, sir.

Q. So would you accept the fact that it did occur after the sale?

A. Yes.

Q. So there was no demand then that the burros not be sold?

A. Yes, sir, I am afraid there was.

Q. Would you explain to me how, if the conversation occurred after the sale, that the demand could be made that they not be sold?

A. The demand was made to recover the burros and return them where they belonged. They had already been sold.

Q. So the demand, then, was not to sell them, but to please return them to the public domain, is that correct?

A. Well, this is—

Q. I didn't talk to you?

[21] A. No, you talked to my administrative assistant.

Q. Have you ever entered into a cooperative agreement with the Bureau of Land Management and the Forest Service concerning the handling of strays or those animals which will fit the definition of wild free-roaming horses and burros?

A. Yes, I did.

Q. Do you have a copy of that agreement with you, Mr. Garner?

A. I think I have, sir. I have it in my other file.

Q. I wonder if you would get it for me, please?

MR. GRANT: Excuse me, I think I have located mine.

Q. Have you located it, Mr. Garner?

A. Yes, I have.

Q. Mr. Garner, I hand you what has been marked as Defendant's Exhibit Number A, and ask if you can tell me what that is?

A. This is a cooperative agreement between the New Mexico Livestock Board and the Forest Service and the Bureau of Land Management, August 7th, 1973.

Q. Would you turn to the last page, please? Is that a facsimile of your signature on that?

A. Yes, sir, this is my signature.

Q. And is this a true copy of the agreement?

[22] A. This is a true copy of the agreement.

Q. And what does that agreement purport to do?

A. It purports to agree to work with the BLM and the Forest Service to help manage the wild and free-roaming horses and burros unclaimed on BLM lands and Forest lands.

Q. And did you operate under that agreement?

A. We operated under that agreement for some time.

MR. GRANT: We offer Defendant's Exhibit A into evidence.

MR. HARRIS: We have no objection to it.

JUDGE SETH: It will be admitted.

(THEREUPON, Defendant's Exhibit A was admitted in evidence.)

Q. Mr. Garner, I hand you what's been marked Defendant's Exhibit Number B, and ask you if you can identify that?

A. This—the same letter as I identified, a letter to Mr. Zimmerman, state director of BLM, advising him that New Mexico Livestock Board was claiming all unbranded, unclaimed animals within the boundaries of the State of New Mexico, and serving notice that the cooperative agreement between the two of us would be voided—would be terminated.

Q. In this letter, do you hereby assert ownership and regulatory right over the horses and mules within the state?

A. Yes, sir.

[23] MR. GRANT: I apologize, Your Honor, this letter is already in evidence. I was thinking it was not.

JUDGE SETH: All right.

Q. What studies have you made, Mr. Garner, to determine the numbers of unbranded and unclaimed horses and burros within the State of New Mexico?

A. My studies and reports from my associates and varying agencies under the category as spelled out in the Act, would be approximately five thousand head.

Q. Well, my question was, what studies have you made or caused to be made to determine that five-thousand figure?

A. Well, through reports from my own inspectors, I have asked how many horses of this caliber would be

in their various districts. We have districts all over the state. I have also been in contact with BLM or the Forest Service and other agencies to determine—

Q. Of those five thousand unbranded and unclaimed horses and burros—incidentally, are all five thousand of those unclaimed, even though they may be unbranded?

A. I would say they were unclaimed. I think they are in the same category as we are speaking of that might be running on Forest lands that would be exempt. For instance, Park Service, they have four or five hundred head of burros up there, but they are exempt from this Act.

[24] Q. But the five-thousand figure would include those?

A. That is right. This includes all the animals on all of the lands in the State of New Mexico.

Q. And would that include those on the private land, owned by private individuals, for instance, in the northern part of New Mexico?

A. Yes.

Q. So the figure would be reduced by whatever that figure is to—

A. Yes.

Q. Excuse me.

A. It would include the ones that are on the—on the White Sands Proving Ground, and this is another five hundred.

Q. Would that also include saddle horses within the City of Albuquerque which are unbranded?

A. I am trying to make my estimation animals that would be affected by this, and I would say—

Q. Of that, whatever is left, now, of the five thousand unbranded horses and burros in the state, how many of those run in herds?

A. I would say that the definition of herd is more than one, and I would say that ninety percent of them run in herds.

Q. That would include a mare and her colt?

A. Not necessarily a mare and a colt, but it could. [25] It would be more than one, but I would—I don't think I would define that. I think that a mare and colt

would be one unit. I would say two mares and two colts would be a herd.

Q. And where are most of those located?

A. They are again all over the State of New Mexico. The western and northern part more than any other place, with the exception of the White Sands.

Q. Of that figure, how many are burros and how many are horses?

A. Including that, I would say the last count I had that possibly there could be seven or eight hundred burros and the balance would be horses.

Q. I believe you testified that normally the procedure over the years under the state stray law, that your department would receive a complaint or notification from a private individual of unbranded and unclaimed horses and burros on his private land, and that your department would then pick up that animal, is that correct?

A. That is right.

Q. And that you trapped them?

A. Whatever method that would need to be to impound them, yes, sir.

Q. I believe that was your testimony?

A. Yes, sir, trapping, yes, sir.

Q. And that then they were sold to private [26] individuals?

A. At public auction, most of the time. Otherwise, they would be sold to the highest bidder, written bids.

Q. Oh, by "highest bidder," this would be a sealed bid or a public?

A. Sealed bid.

Q. And these were private individuals buying them?

A. Yes, there were some private individuals buying, yes, sir.

Q. Were there other than private individuals buying them?

A. Well, I am sure at the auction markets there was—you know, I don't think there was other than private individuals. They might be companies.

Q. But companies would buy them?

A. Right, yes, sir.

Q. What sort of companies, Mr. Garner?
A. Ranches, one thing.
Q. Food processors?
A. Food processor is another thing. Horse trader, simply someone who buys and sells horses, I think would be the main purchasers.
Q. Is it your understanding, and is it the policy of your department, that the State of New Mexico exerts ownership of all unbranded and unclaimed horses and burros within [27] the State of New Mexico?
A. We do not exert ownership but for that purpose of the strays. We simply take care of the animals for owners unknown, we dispose of them and the proceeds are held for two years.
Q. Under what authority can you dispose of them if you are not exercising ownership?
A. We are exercising the stray law that gives us the authority to hold them and dispose of them, and hold the proceeds for the owner unknown.
Q. Mr. Garner, I believe Exhibit Four, your letter to Mr. Zimmerman, states that you are exerting ownership on behalf of the State of New Mexico of these wild horses and burros, no matter where they are found.
Now, is it your position that you exercise ownership, or is it not?
A. Well, I suppose—yes, it would be, because we do have the authority to hold them as strays until an owner is found, and we would be the owner until the owner is found.
Q. Do you have an opinion as a director of the New Mexico Livestock Board, as to whether or not you have any duty under either state or federal law to preserve for the public the wild horses and burros unclaimed and unbranded found within the State of New Mexico?
A. Do I have any duties as to preserve the wild [28] horses?
Q. Yes, sir. Do you have a policy, a departmental policy or do you have an opinion as to whether or not you have that duty?
A. Well, to start with I wouldn't call them wild horses, I would call them stray horses, and we do have—

Q. Excuse me, can you answer the question? Do you have a policy concerning the preservation of wild horses and burros within the State of New Mexico within your department?
A. No.
Q. Do you feel that you have a statutory duty, either under state law or federal law, to protect and preserve those wild horses and burros?
A. I certainly think we should help enforce the federal law, yes.
MR. GRANT: Thank you. I have no further questions.
MR. HARRIS: I have two points that were brought up, Your Honor.

REDIRECT EXAMINATION

BY MR. HARRIS:

Q. Mr. Garner, you have testified about a cooperative agreement entered into with the federal government [29] after the effective date of the Federal Wild Horse Act. Can you identify for us Plaintiff's Exhibit Six, which I now hand you?
A. This was a memorandum of understanding with the Forest Service prior to this agreement.
Q. Immediately prior to it?
A. Immediately prior to the passage of the Wild Horse Act.
Q. And how long had it been in effect?
A. It had been in effect—well, since it went into effect the third day of April, 1969. But there was also one prior to that, a couple of years older. But this one was in effect, and—
Q. It was replaced by the cooperative agreement under the Federal Wild Horse Act?
A. This is right.
Q. And as a matter of fact, Plaintiff's Exhibit Six shows on its face that it replaced one dated 1964, I believe?
A. This is right.

Q. Now, did you give a notice of termination of the cooperative agreement entered into under the Wild Horse Act in accordance with termination provisions of the cooperative agreement itself?

A. Yes, sir, I did.

[30] Q. And for what reason did you terminate that cooperative agreement?

A. We weren't pleased with how the agreement was working. We didn't think that it was working the way it was agreed to, to start with, by all parties concerned. We had nothing to do about determining what animal would be called a wild horse and what would not be called a wild horse, and we felt it was not—we weren't being able to carry out our duties.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit Six.

MR. GRANT: I don't see any objection, Your Honor. It's with the Forest Service, it has nothing to do with this lawsuit.

JUDGE SETH: It will be admitted for whatever it is worth.

(THEREUPON, Plaintiff's Exhibit Six was admitted in evidence.)

Q. And one last point, Mr. Garner: I think there may be some confusion now about the number of unbranded, unclaimed wild horses that in your opinion exist in New Mexico. I am going to try to straighten that out, if you can.

I understand you to say that you think the total population of horses and burros in the state is about a hundred thousand?

[31] A. This is right.

Q. And I don't think you have said, but do you have an idea or an estimate or opinion on it, as to what percentage of that total overall figure is unbranded or—unbranded animals? I am not talking about unclaimed, I am talking about unbranded.

A. I would say at least fifty percent of the horses are not branded.

Q. All right. Now, this category that I asked you about when I first was examining you, was limited to both unbranded and unclaimed animals?

A. This is right.

Q. And your estimate of that figure, as I understand it, is five thousand state-wide?

A. Right.

MR. HARRIS: That's all. Thank you, sir.

RECROSS EXAMINATION

BY MR. GRANT:

Q. Mr. Garner, you have testified that you are familiar with the definition of wild horses and free-roaming horses and burros as contained within that Act, is that true?

A. Yes, sir.

Q. The nineteen burros which are the subject of this lawsuit, do you have an opinion as to whether or not they [32] fit the definition of wild horse and burro, within the meaning of the federal act?

A. They would fit the definition of the federal act.

Q. And, Mr. Garner, since you—the request came to you from the US Attorney's not—to return the nineteen to public domain, did the US Attorney's office receive assurances that no further burros would be picked up and sold at auction from your office?

A. Through my attorney, yes, sir.

Q. And as a matter of fact, has your department subsequently picked up and sold burros at public auction?

A. We have sold two or three, yes, sir.

MR. GRANT: Thank you. I have no further questions.

MR. HARRIS: I have no further questions of this witness.

JUDGE SETH: You may step down.

(THEREUPON, the witness was excused.)

MR. HARRIS: Mr. Stephenson, would you come forward, please, and be sworn?

KELLEY STEPHENSON

was called as a witness by the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Please give us your full name and address, Mr. Stephenson.
A. Kelley Stephenson, Carrizozo, New Mexico.
Q. What is your occupation, sir?
A. Ranching.
Q. How long have you been in the ranching business in all?
A. I have been on this particular ranch twenty-nine years. I have engaged in the cattle business several years before I moved to Carrizozo.
Q. Do you live on the ranch near Carrizozo?
A. Yes, sir.
Q. Where is your ranch from Carrizozo?
A. Due south of Carrizozo, our ranch headquarters are ten miles due south.
Q. Mr. Stephenson, the complaint that was filed in this case alleges in paragraph six on the third page that on January twentieth of this year, you requested the New Mexico Livestock Board to capture and corral nineteen unbranded and unclaimed burros which had been wandering upon your property on your ranch, is that true, sir? Did you make such a request of them?
A. Yes, but it wasn't in January.
[34] Q. When was it that you made the request?
A. It was in February.
Q. Do you remember when?
A. About the fourth of February.
Q. I hand you what's been marked for identification as Plaintiff's Exhibit Seven. Can you identify that document for us, please, sir?
A. That is a map of our BLM allotment. It's issued to the Stephenson Ranch.

Q. Does that show the area that these burros that are mentioned in that paragraph six, were—
A. Yes, sir.
Q. —roaming at the time of your complaint to the New Mexico Livestock Board?
A. That's correct. That whole area had the donkeys roaming on it.
Q. Now, there's coloring on the map. Can you identify that for the Court, tell us what the different areas are?
A. The yellow is the BLM land, the green is patented land, the blue is state land, and there's some white parcels of land in there that are unclaimed, private ownership land.
Q. Now, that's a Xerox copy, is it not, that we have colored, of the original that you have in your possession?
[35] A. That's correct.
MR. HARRIS: We move admittance of Plaintiff's Exhibit Seven.
MR. GRANT: No objection.
JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit Seven was admitted in evidence.)

Q. Is there a fence around that entire acreage that is shown on Plaintiff's Exhibit Seven?
A. No, there is not. There are some—there's a mountain range that runs from the north end in a southwesterly direction, and a great deal of that—oh, five miles, six miles—is unfenced. It's just a high mountain range.
Q. Natural barrier?
A. A natural barrier.
Q. How about your north boundary?
A. That is fenced.
Q. And the boundary on the west?
A. That is fenced, that's along the railroad right-of-way.
Q. Where is the state highway that runs south out of Carrizozo with reference to the map you have?
A. Well, it parallels this land as much as a half- to a quarter-of-a-mile to the west.

Q. It's on west of the railroad?
[36] A. On west of the railroad. The railroad parallels the fence.
Q. Now, on your south boundary, you have a fence down there?
A. Yes, sir.
Q. And who bounds you on the south, Mr. Stephenson?
A. The Three Rivers Ranch that had been owned by Mr. Tom Ryan for several years.
Q. Is it now?
A. No. He has sold it to Leavell, Charles Leavell Company in El Paso.
Q. And they are running it now?
A. I will say he has sold it, it's under contract.
Q. I notice at the extreme end of that fence separating your land from Leavell's, there is the same sign, that of a mountain range, that is shown up at the extreme north end. Is that fenced or unfenced?
A. Well, his fence line isn't shown on there because the land to the east of that irregular line is about three thousand acres in there of our patented land that runs north and south against that irregular line.
Q. I guess my question wasn't put well. Do I understand, then, that horses or cattle or burros can roam anywhere on that entire acreage that's colored in on Plaintiff's Exhibit Seven?
[37] A. On all of that, and on the acreage to the east of it.
Q. Including the state land and your own private fee land?
A. Yes, and—
Q. And BLM land?
A. And Mr. Ryan's original ranch.
Q. Now, the BLM land, you have shown in yellow, have you not?
A. That's right.
Q. Do I understand you to say you have that BLM permit to run cattle on that?
A. That's correct.
Q. What sort of an allotment do you have in that respect?

A. We have a two-hundred-head permit for six months.
Q. That's part of your overall ranch operation?
A. Yes.
Q. What sort of cattle operation do you run down there, Mr. Stephenson?
MR. GRANT: Your Honor, this is really getting irrelevant now. Object to this line.
JUDGE SETH: I think the complaint indicates that they interfered with the cow and calf operation. You may [38] answer the question.
Q. What sort of operation do you conduct?
A. Cow and calf in that area.
Q. How long have you had this allotment from BLM to run two hundred head of cows on that government land?
A. Since about 1960, but I have managed this allotment since 1945. I originally had charge of this ranch for Harold Brothers and moved there in 1945, and now I have had direct charge of it since 1945.
Q. Does the map indicate on it by any reference at all where the burros were when they were picked up by the New Mexico Livestock Board?
A. Yes, it would be section thirty.
Q. And is there a color there, or a circle or anything that will identify that for the Judges?
A. It has a circle and a red mark on it.
Q. What does that indicate, Mr. Stephenson?
A. We know that as the Taylor Well. And that's a joint watering between the Ryan Ranch and our ranch.
Q. Mr. Stephenson, when did you first learn—when and how did you first learn about these particular burros being on your ranch?
A. Well, could I expand on that just a little bit?
Q. Yes, sir.
A. We have had a few burros down in that area, I [39] know, to my knowledge, for the last twenty-nine years.
Q. In that area, you are talking about the government land or are you talking about fee land, or what are you talking about?

A. Well, mostly on your fee land, because they run —that is the best land and that's where the burros run, up in the mountains.

Q. That's toward the east, then, of the BLM land?

A. That's correct.

Q. And by "a few," can you give us an idea how many, of your knowledge, have been down there for several years?

A. Eight to ten would be the most that we would ever tally.

Q. All right. Have you had any trouble—how many years did you say that they have been down there?

A. Well, I have been there twenty-nine years and there's been a few donkeys there for the last twenty-nine years.

Q. Has there been any trouble at all on your ranching operation with respect to maintaining the herd at that level?

MR. GRANT: To which we object as being irrelevant to the issue in this lawsuit.

JUDGE SETH: I think it's irrelevant, Counselor. We are talking about these particular burros that were impounded.

[40] Q. Now, you were about to tell us how you first found out about these particular burros and when you did so. Please do that.

A. Well, it was February first and I learned about this large number of donkeys, and I called by the BLM office to talk to them about another matter, and—

Q. Which office and with whom did you speak in BLM?

A. Well, Mr. Charles Hodgins, who is the assistant manager of that office.

Q. Where?

A. At Las Cruces. And in this conversation was Mr. Barker, who is in charge of that district, and one of their assistants sat in on the conversation, too. I can't tell you his name. He's been replaced by—he was replacing Jack Allbright who had charge of our area.

But in the course of the conversation, Mr. Hodgins said, "Well, Kelley, we have just come from up at your ranch"—

MR. GRANT: Objection; hearsay.

MR. HARRIS: If the Court please, it's not hearsay. First, it is a statement from the defendant itself by its own agents, and second, we are not offering it for proving the truth of the statement but only that the statement was made.

[41] JUDGE SETH: Overruled.

Q. Go ahead, please, sir.

A. He said, "We were up at your ranch a day or two ago and," he says, "there was quite a bunch of donkeys at the Taylor Well." And he says, "Here's a picture of them," and he pulled the picture and showed it to me.

And he said, "We counted twenty-five donkeys there." And I told him, I said, "Well, Charles, I have never seen a donkey at Taylor Well. We have always had a few donkeys, but they were up in the mountains."

He said, "Well, there's a picture of them." And we had a general conversation about them, of course, and the climax of the conversation was, I asked him, I said, "Well, Charles, what happens when you have a band of donkeys in this amount and they don't get along with the cows?"

And he says, "Well, if the donkeys—or if the cows interfere with the donkeys, the cows has got to go."

Q. Did you check out the existence of that size donkey herd then, after that?

A. Now, that was on Friday. On Saturday I went to the Taylor Well, and this band of donkeys was there. I counted twenty-four that time.

Q. And tell us exactly what you did observe in addition to the twenty-four donkeys.

A. Well, the donkeys were all on the feed ground, [42] and there was some cows down there, there was a limited number of cows around the perimeter of this feed ground, but the donkeys had run the cows away.

Q. How many cows were you feeding down in the Taylor Well area?

A. At that time there was between forty and fifty.

Q. And what kind of feed were you giving them?

A. Protein blocks.

Q. And what did you observe with respect to the donkeys and the food that you had put out for the cattle?

A. Well, they were eating the protein blocks.

Q. Did you continue to check on them afterwards?

A. Almost daily. We were there the next day, and the fact of the matter of the business is, my son Bill took some pictures of them on Sunday.

Q. What did you observe during that entire week following your first observation on that Sunday?

A. Well, when we would go down there with a load of feed, those donkeys would come right on in to the feed ground and take charge of it, and stay there until they eat up those blocks.

Q. What can you say with respect to their apparent wildness during your observation?

A. Well, in my opinion, they were not wild, because you could walk around them, you could take pictures of them, [43] you could—it was pretty hard to disturb them. I don't think you could run them off unless you done it on a horse.

Q. All right. What, if anything, did you do, or have you done, about getting rid of them?

A. Well, when I heard about the donkeys from Mr. Hodgins, when I returned to the ranch I talked to my son, Bill, and he says, "Well, I believe that the Sanitary Board could take care of those for us."

Q. Did you people call the Livestock Board?

A. He did. I didn't. He called Mr. Owensby.

Q. That's Mr. Fred Owensby?

A. Mr. Fred Owensby.

Q. Did he come down?

A. Yes, he come down.

Q. When was that, if you recall?

A. We called him on the fourth and he said that he would organize his group and come down and get the donkeys, and I believe it was the following Monday, which would have been probably, I think, the eleventh.

Q. And did they gather and remove the donkeys?

A. He come down there and took charge of the donkeys, and I wasn't on hand so I can't testify as to what took place there.

I just know that they gathered the donkeys and took them away.

[44] Q. From your long experience in the ranching business have you had occasion to observe the compatibility of burros and cattle running together and being fed together?

A. Any time you have a herd of donkeys intermingled with jacks, of course, you can't run cows and baby calves.

Q. Why can't you?

A. They kill them.

Q. Mr. Stephenson, on the day you went down on Sunday and first saw the twenty-four donkeys, did you observe any evidence of any damage to any of your fences or your gates?

MR. GRANT: Your Honor, I object to this line of questioning as being irrelevant.

JUDGE SETH: He can testify as to the physical situation there.

Q. Go ahead, sir.

A. I had had a report from my son and the cowboy that works for us about the situation that they had found when we moved the cows down there the first of December, and he could testify to that. Or I can tell you, if you would like for me to, what they found.

Q. Well, let me first start with when did you put out the supplement blocks, the cake, that you saw the burros eating when you went down there on Sunday?

A. We just had started feeding.

Q. You mean by that—

[45] A. Maybe a week before, something like that.

Q. Were you gates up down there on the south boundary at that time?

A. Were the what?

Q. The gates, were they up and in good repair?

A. They were at that time.

Q. Had they been damaged previously?
A. Well, they had been. Someone had evidently been into our corrals and taken a big two-by-six gate, unscrewed it, and took it off the hinges and laid it down like they had unloaded something, and run it out into our pasture.
Q. When did you first observe that situation there at the Taylor Well?
A. When we moved the cows down there. And Bill could testify to that because he was present then, I wasn't
Q. How far is that Taylor Well east of the Carrizozo highway?
A. A little over a mile, about a mile-and-a-half.
MR. HARRIS: Thank you, Mr. Stephenson.

CROSS EXAMINATION

BY MR. GRANT:

Q. Just to clear up the record, Mr. Stephenson, I believe you testified that when Mr. Harris was reading to you [46] the complaint—incidentally, have you ever seen the complaint filed by the State of Kansas before —or State of New Mexico before?
A. No, I don't think I have seen that.
Q. I believe he read to you out of paragraph six saying that these burros were on your property, and later on I believe you testified that the burros were down around Taylor Well, shown in yellow on this?
A. At this particular time they were in BLM land on the Taylor Well.
Q. That's not your property there?
A. No, that's government property.
Q. That's federal property, yes. When Mr. Hodgins came out and talked to you—did he come out to your place to talk to you, or did you go in and talk to him?
A. Well, he and Bill had the conversations.
Q. Oh, you didn't have a conversation with Mr.—
A. No, Bill had the conversation with him.

Q. So what you were talking about was what somebody else told you that he said?
A. That was hearsay.
Q. And the picture you were talking about, you never saw?
A. This picture?
Q. That Mr. Hodgins took, you were talking about [47] him having a picture?
A. Oh, no, we took the pictures. I saw the pictures.
Q. Mr. Hodgins didn't take a picture or show you a picture?
A. I don't know about his pictures, but Bill took some pictures and sent some of them to Mr. Owensby.
JUDGE SETH: I think you are confusing the meeting at Las Cruces with the conversation with Mr. Owensby.
MR. GRANT: That could very well be.
THE WITNESS: And I mentioned pictures, too, that Mr. Hodgins had in his possession, taken by the BLM agents.
Q. All right. Did you see those pictures?
A. I saw them.
Q. Okay. Would you recognize those pictures again if you saw them?
A. Oh, I think I would.
Q. Are those the pictures that you saw, or either one of them?
A. Well, he had several pictures there and, of course, our pictures were also taken in this same area, but I would say that those were the pictures that Mr. Hodgins showed me.
MR. GRANT: All right, sir.
We intend to—well, I started to say, [48] Your Honor, that we intended to have a witness properly identify these pictures and have them introduced at that time, but—
MR. HARRIS: We have no objection to their receipt in evidence. I think the witness has already identified them.

JUDGE SETH: You can introduce them through Mr. Stephenson.

Q. Mr. Stephenson, I showed you the pictures that have been marked as Defendant's Exhibit C, and ask you to look at the uppermost picture of those two. Can you see the burros in that picture?

A. Yes.

Q. Can you see the cattle in that picture?

A. Yes.

Q. Is that a picture of Taylor Well?

A. Yes.

Q. And where are the burros in relation to the cattle and the Well?

A. Well the cows—the burros in this particular picture are on the perimeter of the feed ground, and the cows would be directly on the feed ground.

Q. Wouldn't appear, then, that the burros have run the cattle off, would it?

A. Well, you can't tell. You can't tell.

[49] MR. GRANT: We offer Exhibit C.

MR. HARRIS: We have no objection.

JUDGE SETH: Be admitted.

(THEREUPON, Defendant's Exhibit C was admitted in evidence.)

Q. Did Mr. Hodgins ever explain to you the Wild, Free-Roaming Horse and Burro Act?

A. No, he didn't. When I got home, I had a copy of it and read it.

Q. Did you read it?

A. Yes, sir.

Q. Was this prior to calling the State Livestock Board about the burros at the Taylor Well?

A. Well, during that time. I can't say whether it was before, because I was curious because from the statement that Mr. Hodgins made to me. I just couldn't understant an act that would say that burros had the dominance over things, you know, over the range.

Q. Is this what you meant when you say that Mr. Hodgins said that the cows had to give way to the burros?

A. He said the cows have got to go, that's his exact statement.

Q. He was talking in relation to the Wild Horse and Burro Act?

A. Yes.

[50] Q. The burros on this ranching operation ranged generally in the Godfrey Hills, do they not?

A. That's correct.

Q. And the Godfrey Hills are primarily on BLM land, are they not?

A. Well, our Godfrey Hills are primarily all patented. Now, there's some Godfrey Hills south of our ranch in the Ryan Ranch, that I really don't know the exact status of.

Q. When you saw this—I am a little confused about the gating being down. Are you trying to say, Mr. Stephenson, that someone may have put these burros on your ranching operation?

A. I can very easily imagine that. I never had a concentration like that. We never had any burros at Taylor Well.

Q. Is Taylor Well your well? Do you own the water rights?

A. Well, it's a joint watering. We put the improvements there, Mr. Ryan—and that's when he had the ranch—and our ranch, and we maintain them. We have dug a new well there. We built the corrals there about four years ago, have a nice set of corrals there, and we work our cattle.

Q. You make use of the well?

A. We make use of the well and the corrals, too.

Q. But you don't own the water rights from the well, [51] do you, Mr. Stephenson?

A. Only by what rights we have by using BLM land, you know? You list those improvements when you take a BLM permit. We have the well listed as part of our improvements and the corrals listed as part of our improvements.

Q. Is the Taylor Well, if you know, public water reserve?

A. I can't answer that.

MR. GRANT: Thank you. I have no further questions.

REDIRECT EXAMINATION

BY MR. HARRIS:

Q: Mr. Stephenson, can you identify for us, please, the photographs now marked as Plaintiff's Exhibits Eight through Eleven, inclusive?

A. Well, like I said, Bill took some of them pictures and I think that Mr. Owensby took some of those pictures.

Q. My question of you is do you recognize them as photographs of your cattle at the well?

A. I recognize the location and I know I have seen these two pictures, and I am not right sure about—

Q. You are talking about Plaintiff's Ten and Eleven?

A. I think that's the pictures that Bill took.

[52] Q. And do you recognize that as the Taylor Well area?

A. Oh, that is, that is definitely.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibits Ten and Eleven.

MR. GRANT: No objection.

JUDGE SETH: They will be admitted.

(THEREUPON, Plaintiff's Exhibit Ten and Eleven were admitted in evidence.)

MR. HARRIS: That's all. Thank you, sir.

JUDGE SETH: Anything further of this witness?

MR. GRANT: Nothing further.

JUDGE SETH: You may be excused.

(THEREUPON, the witnes was excused.)

MR. HARRIS: Mr. Pankey, would you come forward, please?

RUBEN E. PANKEY

was called as a witness by the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. State your name, please, and your address.

A. Ruben E. Pankey, Truth or Consequences, [53] New Mexico.

Q. What is your occupation?

A. Rancher.

Q. How long have you been a rancher in New Mexico?

A. Lifetime.

Q. What is your age?

A. Fifty-six.

Q. Are you presently active and have you been for some time in the past, in either the state or the national Cattlemen's Association?

A. Yes. I—I am presently very active in that area, a lifetime in New Mexico Cattle Growers, and many years with the American National Cattlemen.

Q. What, if any, titles or offices have you held in any or both of those associations?

A. Presently I am a mmeber of public lands committee of the American National Cattlemen, immediate past chairman of the forest committee of the American National Cattlemen, and a member of the legislative committee of the same organization, and vice-chairman of the public lands committee, New Mexico Cattle Growers.

Q. Is there such a thing as Public Lands Council?

A. Oh, yes. We have an organization of sixteen western states called the Public Lands Council, which is comprised of the grazers of the public domain in these sixteen [54] western states, both Forest and Bureau of Land Management lands.

Q. Do you have any connection with the Council?

A. Yes, I am an ex officio member representing the American National Cattlemen.

Q. How long have you been?

A. Since we organized this organization in 1969.

Q. Does that organization work closely with both the BLM people and the Forest Service people?

A. Very, very closely. That's our main concern of our organization, the reason we were organized is to

protect our rights and privileges that we enjoy under the grazing cattle on public domain.

Q. Do you have a knowledge, Mr. Pankey, of the Federal Wild Horse Act?

A. I have a working knowledge of it. I am not too well versed by letter and word of the entire Act, but I do know what it means and what it does.

Q. Is that a subject of some concern with your national organization?

A. It's a subject of very grave concern. We have just had a meeting in Denver, and our main agenda, or one topic, was the unmanageable situation.

MR. GRANT: Well, now, Your Honor, I am going to object to this line to testimony.

[55] JUDGE SETH: Well, I think the characterization is perhaps a little bit extreme, but he can testify that subject was discussed.

THE WITNESS: We discussed the administration and impossibility of living under the Wild Horse and Burro Act.

Q. What is the problem that your organization or association sees in the particular area, Mr. Pankey?

JUDGE SETH: Counsel, I don't believe that's relevant to discuss in our litigation here.

MR. HARRIS: If the Court please, may we make a tender of proof on it for the record?

JUDGE SETH: Yes—

MR. HARRIS: We will be brief.

JUDGE SETH: —you may.

TENDER OF PROOF

BY MR. HARRIS:

Q. Now, do you recall my last question?

A. What was our main concern?

Q. Yes, sir.

A. Is the ownership of the animals, and inability of the governmental agencies to deliver title, and the control of numbers which will destroy our ranches.

Q. New, tell us what you mean by the control of numbers, please.

[56] A. Well, as has been previously testified, and I concur, that the numbers will double in three to four years and double in the same period thereafter. There's no absolute allocation of BLM for these animals, someone has to give. And we can see a terrible conflict there in the use of the forage which is needed for national needs.

Q. Well, as a matter of fact, are you familiar with regulation four seven one two point one dash four, promulgated by the Bureau of Land Management, on that very subject as to closing public lands to grazing?

A. I am just only reasonably familiar with this, but we had been worried by what was in the main Act, for the lack of absolute definition where these horses were to be accommodated.

Q. Have you had occasion recently to look at that promulgated regulation about enclosure?

A. Yes, I have, and it seems to be in conflict, to me, as to what the Act itself says.

Q. In what respect, please?

MR. GRANT: May I inquire, is this still part of your tender?

MR. HARRIS: It's part of the tender, yes.

THE WITNESS: Well, the Act seems to have a limiting effect as far as I can tell, and this has a very broad effect of where there will be no end to the amount of [57] wild horses allowed.

Q. Do you have some knowledge yourself, Mr. Pankey, as a rancher of long standing in New Mexico, about the rapidity at which these unclaimed, unbranded herds of horses or burros multiply in New Mexico?

A. Yes. From a lifetime of grazing horses, and from the removal of the wild horses in the southern part of the state when I was from about fifteen years on, the—New Mexico has a very fine climate, type of forage, mild climate, and the horses here multiply very rapidly. It's disease-free, and that's why there were in such great numbers to start with, the reason for the passage of the Taylor Grazing Act.

Q. What period are you talking about?

JUDGE SETH: Counsel, I think you are abusing your privilege of the offer of proof. We will consider that the completion of the offer.

MR. HARRIS: That's all the questions we have, if the Court please.

JUDGE SETH: It is excluded.

MR. GRANT: No questions.

JUDGE SETH: You may be excused.

(THEREUPON, the witness was excused.)

JUDGE SETH: Do you have any other witnesses?

MR. HARRIS: That concludes the plaintiff's [58] proof, Your Honor.

JUDGE SETH: Plaintiff rests.

We have a proof problem, obviously, counsel. Do you wish to reopen the case?

MR. GRANT: Your Honor, I think possibly a motion to dismiss is in order at the present time.

JUDGE SETH: Well, let's first decide, do you wish to offer any additional proof? We will have to decide that first.

By way of witnesses or any exhibits, anything of that nature?

MR. GRANT: May I have a moment to confer?

JUDGE SETH: Yes.

MR. GRANT: I think, Your Honor, that the defendant at this time declines to offer to produce testimony.

JUDGE SETH: You will rest at this point, is that correct?

MR. GRANT: Yes, sir.

JUDGE SETH: You may make your motion if you wish to do so.

MR. HARRIS: If Your Honor please, before he does, I am sorry, I inadvertently failed to call as an adverse witness, Mr. Harlan Smith, whom we subpoenaed here to testify on one point only, and by him I intend to put in one document, and I would like to do—

[59] JUDGE SETH: You may reopen your case.

Is Mr. Smith here?

HARLAN SMITH

was called as an adverse witness by the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. What is your full name?

A. Harlan Smith.

Q. What is your address and your occupation or profession?

A. Santa Fe. I am chief, branch of protection for the Bureau of Land Management.

Q. Can you identify for me, please, what's marked as the Plaintiff's Exhibit Twelve, Mr. Smith?

A. This is a news release issued by Doyle Cline, September 21st, 1973, referring to wild horses and burros in New Mexico.

Q. Out of your Santa Fe office of BLM?

A. Yes, sir. It says from Santa Fe.

Q. That, then, is an official publication of the BLM out of the Santa Fe office?

[60] A. Yes.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit Twelve.

MR. GRANT: May I inquire of the witness, was this ever published, this news release?

THE WITNESS: I don't know.

MR. GRANT: We object, Your Honor, to the admission of Plaintiff's Exhibit Twelve.

JUDGE SETH: Do you have anything to say about its publication or nonpublication?

MR. HARRIS: If the Court please, it is an official record according to what the witness just testified to, of the BLM office in Santa Fe, and, therefore, admissible under the Official Documents Rule.

JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit Twelve was admitted in evidence.)

MR. HARRIS: That's all the questions we have, Your Honor.

MR. GRANT: No questions.

(THEREUPON, the witness was excused.)

JUDGE SETH: Both sides have rested, then, is that correct?

MR. HARRIS: Yes, sir.

JUDGE SETH: As far as legal arguments are [61] concerned, I think that the Court would prefer it if you would submit memoranda or briefs on the subject, instead of arguing the case orally.

MR. HARRIS: We have three here, Your Honor, for that purpose, if we may present them now.

JUDGE SETH: Yes, give them to the clerk.

And do you wish to renew your motion to dismiss, Counsel?

MR. GRANT: Yes, Your Honor, and not for the purpose of legal argument, but merely to bring the Court's attention—like in the first place, plaintiff's have failed to sustain so far the burden of the allegations contained in their complaint. They have failed to establish a case or controversy, and I would merely like to bring the Court's attention to a recent Ninth Circuit decision not yet published, but it's case number seventy-one dash one nine two seven, the *Rincon Band of Mission Indians* v. *the County of San Diego*, and others, where the Court found that the general threat of enforcement of a statute is insufficient to create a controversy or case.

And the injunctive relief sought here is insufficient to form a case or controversy under that—any general threat of a statutory enforcement.

I think, Your Honor, and also not to get into the brief on—that's to be filed, but I think this bears [62] bringing to the Court's attention at this time, too, and we move to dismiss on jurisdictional grounds at this time for the reason that this case, the plaintiffs have failed to prove or show either in their pleadings or in their evidence that they are entitled to a three judge court.

This case should have been assigned to a single judge district court, and we merely bring the Court's attention to the recent United States Supreme Court decision of

Swift and Company v. *Wickham*, found in 382 U.S. 11, where the Court reaffirmed the old rule that a case brought merely under the supremacy clause is not sufficient constitutional question to justify a three judge court, and dismissed the action on the grounds of jurisdiction.

And it's the same situation we have here. There's been no showing other than a bare statement of constitutional encroachments that anything other than the supremacy clause is involved, and for that reason we feel that this court is without jurisdiction to hear this matter.

JUDGE SETH: Would you have any objection in the event the Court agrees with you on that point, to disposition of the case by Judge Payne as a single judge?

MR. GRANT: Have no objection.

JUDGE SETH: On the basis of the proof that we have heard—

MR. GRANT: We would ask this, Your Honor, [63] that if a decision is to be made, that it be made promptly. Seven of the little animals have died in captivity, and we would like to have this case over as soon as possible.

JUDGE SETH: Very well.

Do you want to respond to the motion?

MR. HARRIS: No, Your Honor. I do not care to. I would like the opportunity of filing a reply brief if they are going to file an answer brief, since we have the right to open and close, any arguments.

JUDGE SETH: How about the time? Do you have a brief prepared, Counselor?

MR. GRANT: No, Your Honor, we do not. We planned to present oral argument.

JUDGE SETH: Yes, I understand that. How long a period of time, say twenty days? Would that be sufficient?

MR. GRANT: I think twenty days would be sufficient, yes, sir.

JUDGE SETH: And you may respond in five days after that.

MR. HARRIS: Thank you, sir.

JUDGE SETH: The case is submitted, then, on that basis, and the court will be in recess.

(THEREUPON, court stood in recess.)

[PLAINTIFFS' EXHIBIT 1]

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
State Office
P. O. Box 1449
Santa Fe, New Mexico 87501

December 3, 1973

Mr. Lee S. Garner
Director
New Mexico Livestock Board
P. O. Box 2048
Albuquerque, NM 87103

Dear Mr. Garner:

We acknowledge receipt of your letter of November 14, 1973, in which the New Mexico Livestock Board on behalf of the state asserts ownership and regulatory rights over any horse, mule or ass found running at large upon public or private lands in New Mexico.

Your letter has been forwarded to our Field Solicitor and to our Washington Office for their response. Once they have fully reviewed your letter, we will advise you of how your claim will be processed. It is my responsibility to advise you that we fully intend to enforce Public Law 92-195 and the Department of the Interior, Bureau of Land Management regulations 43 CFR 4700 as they pertain to the protection, management and control of wild horses and burros on the national resource lands. As requested, the "Cooperative Agreement" of August 7, 1973, between the New Mexico Livestock Board, the U. S. Forest Service through the Regional Forester of Region 3, and the Bureau of Land Management through the State Director will be considered terminated as of January 14, 1974. We assume that you will continue to honor the agreement until the 60-day period has lapsed

and take no contrary actions during this period. Hopefully we will be able to advise you as to how your claim will be processed by that time.

Sincerely yours,

/s/ Keith E. Norris
Acting State Director

[PLAINTIFFS' EXHIBIT 2]

November 14, 1973

Mr. William Hurst, Regional Director
Southwest Region of the U. S. Forest Service
U. S. Department of Agriculture
514 Gold, SW
Albuquerque, New Mexico 87103

Dear Mr. Hurst:

This is to advise you that the New Mexico Livestock Board, on behalf of the State of New Mexico, hereby asserts ownership and regulatory rights over any horse, mule or ass found running at large upon public or private lands, in New Mexico, whose owner is unknown, whether branded or unbranded, or which animal is branded with a brand which is not on record in the office of the New Mexico Livestock Board, as per the definition of "estray" animals, 47-14-1 N.M.S.A. (1953 Comp.)

Implementation of the New Mexico Estray Law, Chapter 47, Article 14, N.M.S.A., is provided for the "Wild Horse Act", at Title 16, Sec. 1335, U.S.C.A. The New Mexico Livestock Board, pursuant to this section of the Federal "Wild Horse Act", and pursuant to the estray laws of New Mexico, hereby serves notice that it intends to exercise its powers under these statutes to regulate, impound, or take up such estray horses, mules or asses, as defined above. Also, pursuant to 47-14-5 and 47-14-6, N.M.S.A. (1953 Comp.) and Title 16, Sec. 1335, U.S. C.A., the New Mexico Livestock Board intends to exercise its right to sell said impounded estray animals to private individuals, if said estray animals shall not be claimed after publication and posting of notice as required by Chapter 47, Article 14, N.M.S.A.

The New Mexico Livestock Board hereby serves notice that it is terminating the "Cooperative Agreement" of August 7, 1973, between the New Mexico Livestock Board, the U. S. Department of Agriculture (by the

U. S. Forest Service) and the U. S. Department of the Interior (by the Bureau of Land Management), as per Sec. C, Paragraph 3, of the agreement which provided that it ". . . can be terminated by any party upon 60 days written notice to the others." This letter shall constitute the written notice by which said agreement shall be terminated in 60 days.

To the extent that the Chapter 47, Article 14, N.M.S.A. definition of "estray" conflicts with the Federal "Wild Horse Act" definition of "wild free-roaming horses and burros", the New Mexico Livestock Board hereby serves notice that it intends to exercise all regulatory, impoundment and sale powers which it derives from the New Mexico Estray Law, over all estray horses, mules or asses found running at large upon public or private lands within New Mexico, as defined in the New Mexico Statutes above. This includes the right to go upon Federal or State lands to take possession of said horses or burros, should the Livestock Board so desire.

As an additional basis of the authority of the State of New Mexico, through the New Mexico Livestock Board, to assert jurisdiction, ownership and regulatory powers over these estrays, it is hereby asserted that all non-migratory animals within the boundaries of the State of New Mexico belong to the people of the State, whether said animals are on Federal or State lands, and that the ownership of said wild animals, so far as they are capable of ownership, is in the State of New Mexico, in its sovereign capacity, as a representative, and for the benefit of all its people. The State of New Mexico has the right to control and regulate the common property in these wild animals within its boundaries. Since these horses or burros are not the subject of interstate commerce, and are non-migratory, and since the Federal government is not asserting that said animals are damaging Federal lands (whereby, arguably, the Federal

government may have the right to destroy said animals), the Federal government has no right to control, regulate or assert ownership of these animals.

Sincerely yours,

LEE S. GARNER, Director
New Mexico Livestock Board

LSG/lls

cc: Gerry Hopkins, Attorney
Modrall, Sperling, Roehl, Harris & Sisk

[PLAINTIFFS' EXHIBIT 3]

UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE
Region 3
517 Gold Avenue S.W.
Albuquerque, New Mexico 87102

2260
November 19, 1973

Mr. Lee S. Garner, Director
New Mexico Livestock Board
P. O. Box 2048
Albuquerque, New Mexico 87103

Dear Mr. Garner:

This will acknowledge receipt of your letter dated November 14, 1973, whereby you assert ownership and regulatory rights over any horse, mule or ass found running at large upon public or private lands.

This will advise you that I have referred your letter to our Office of General Counsel for their response. Once they have fully reviewed your letter, we will advise you of how your claim will be processed. However, I feel it my responsibility to advise you that we fully intend to enforce Title 16, Section 1331, et seq., U.S.C.A. and the corresponding Secretary of Agriculture's Regulation 36 CFR 231.11 as they pertain to the protection, management and control of "wild, free-roaming horses and burros" on National Forest System lands.

As per your request, the "Cooperative Agreement" of August 7, 1973, between the New Mexico Livestock Board, the U.S. Department of Agriculture (by the Forest Service) and U.S. Department of Interior (by the Bureau

of Land Management) will be considered terminated as of January 14, 1974. We assume that you will continue to honor the agreement until the 60 day period has lapsed and take no contrary actions during this period. Hopefully, we can have our Office of General Counsel review the claim by this time.

Sincerely,

/s/ Wm. D. Hurst
WM. D. HURST
Regional Forester

[PLAINTIFFS' EXHIBIT 4]

NEW MEXICO LIVESTOCK BOARD

November 15, 1973

Mr. Art Zimmerman, State Director
Bureau of Land Management
U.S. Department of Interior
P. O. Box 1449
Santa Fe, New Mexico 87501

Dear Mr. Zimmerman:

This is to advise you that the New Mexico Livestock Board, on behalf of the State of New Mexico, hereby asserts ownership and regulatory rights over any horse, mule or ass found running at large upon public or private lands, in New Mexico, whose owner is unknown, whether branded or unbranded, or which animal is branded with a brand which is not on record in the office of the New Mexico Livestock Board, as per the definition of "estray" animals, 47-14-1, N.M.S.A. (1953 Comp.)

Implementation of the New Mexico Estray Law, Chapter 47, Article 14, N.M.S.A., is provided for in the "Wild Horse Act", at Title 16, Sec. 1335, U.S.C.A. The New Mexico Livestock Board, pursuant to this section of the Federal "Wild Horse Act", and pursuant to the estray laws of New Mexico, hereby serves notice that it intends to exercise its powers under these statutes to regulate, impound, or take up such estray horses, mules or asses, as defined above. Also, pursuant to 47-14-5 and 47-14-6, N.M.S.A. (1953 Comp.) and Title 16, Sec. 1335, U.S.C.A., the New Mexico Livestock Board intends to exercise its right to sell said impounded estray animals to private individuals, if said estray animals shall not be claimed after publication and posting of notice as required by Chapter 47, Article 14, N.M.S.A..

The New Mexico Livestock Board hereby serves notice that it is terminating the "Cooperative Agreement" of August 7, 1973, between the New Mexico Livestock Board, the U.S. Department of Agriculture (by the U.S. Forest Service), and the U.S. Department of the Interior (by the Bureau of Land Management), as per Sec. C. Paragraph 3, of the agreement which provided that it ". . . can be terminated by any party upon 60 days written notice of the others." This letter shall constitute the written notice by which said agreement shall be terminated in 60 days.

To the extent that the Chapter 47, Article 14, N.M.S.A. definition of "estray" conflicts with the Federal "Wild Horse Act" definition of "wild free-roaming horses and burros", the New Mexico Livestock Board hereby serves notice that it intends to exercise all regulatory impoundment and sale powers which it derives from the New Mexico Estray Law, over all estray horses, mules or asses found running at large upon public or private lands within New Mexico, as defined in the New Mexico Statutes above. This includes the right to go upon Federal or State lands to take possession of said horses or burros, should the Livestock Board so desire.

As an additional basis of the authority of the State of New Mexico, through the New Mexico Livestock Board, to assert jurisdiction, ownership and regulatory powers over these estrays, it is hereby asserted that all non-migratory animals within the boundaries of the State of New Mexico belong to the people of the State, whether said animals are on Federal or State lands, and that the ownership of said wild animals, so far as they are capable of ownership, is in the State of New Mexico, in its sovereign capacity, as a representative, and for the benefit of all its people. The State of New Mexico has the right to control and regulate the common property in these wild animals within its boundaries. Since these horses or burros are not the subject of interstate commerce, and are non-migratory, and since the Federal government is not asserting that said animals are damaging Federal

lands (whereby, arguably the Federal government may have the right to destroy said animals), the Federal government has no right to control, regulate or assert ownership of these animals.

Sincerely yours,

LEE S. GARNER, Director
New Mexico Livestock Board

LSG/lls

cc: Gerry Hopkins, Attorney
Modrall, Sperling, Roehl, Harris & Sisk

[PLAINTIFFS' EXHIBIT 5]

Fred H. Owensby, Assistant Director
New Mexico Livestock Board 2/21/74

REPORT OF: ESTRAY BURROS ON STEPHPNSON 1/X RANCH—CARRIZOZO, NEW MEXICO

Kelley Stephenson—Owner
Bill Stephenson —Son

February 4, 1974

I received a telephone call from Mr. Bill Stephenson, son of Mr. Kelley Stephenson, owner of the 1/X Ranch, whose ranch headquarters is located 10 miles south of Carrizozo on Highway 54, and 5 miles east.

Mr. Bill Stephenson reported the presence of approximately 25 head of burros in one herd that had recently appeared on lands owned or leased by 1/X Ranch and were causing problems in his livestock operation. The attached allotment map indicates the problem area comprising approximately 8,000 acres BLM lease, 1,000 acres State lease and 3,000 acres deeded land upon which the burros were found.

The following information was obtained from B. Stephenson during our conversation:

1. The area is customarily utilized as winter pasture for cows and calves which were moved into the area soon after January 1, 1974. As a winter supplement feed, protein blocks are put out for the cattle periodically at the various wells (4). The burros approximately 25 head, were first observed about January 20 on a routine check by Stephenson's of the cattle and to put out feed. Stephenson reports he saw the burros eating the feed and runing the cattle from feed.

2. Although a few burros had been seen during past years in the higher country to the South and East, they were never a problem. They had never seen any numbers concentrated in an area, particularly the lower flat lands. The twenty-five appeared to be fairly gentle.

Stephenson asked if the New Mexico Livestock Board could help with the estray or trespass burros. I informed Stephenson if he could pen the animals, I would send an inspector to try to determine ownership. Mr. Stephenson felt he would have no problem in corralling burros at the pens located at Taylor Wells.

Upon reporting to Mr. Garner the above information, he instructed me to proceed under the Estray Laws and offer assistance to Stephenson, if needed. (See letter to Mr. Bill Stephenson, February 5, 1974).

February 6, 1974

Mr. Kelley Stephenson, owner of 1/X Ranch appeared in my office to further explain the problem and informed me he was concerned about the damage caused by the burros, i.e., cost of feed consumed, and danger to the baby calves.

He reported that he had visited the BLM office in Las Cruces a few days prior and was shown pictures of the burros around Taylor Wells standing the cattle off from feed. The pictures were reportedly taken, unknown to him at the time, approximately Jan. 15. When he inquired from the Asst. Manager of BLM, Charles Hodgins, what they would do about the burros, he was told "the cows will have to go".

Additional information from Mr. K. Stephenson:

Mr. Tom Ryan, former owner of Three Rivers TR Ranch, had purchased several loads of burros about 18 years ago and turned them out to pasture adjacent to the 1/X Ranch.

The TR Ranch sold to Charles Level approximately 18 months ago. Mr. Harold Shepard is foreman for the present owner of TR Ranch.

February 6

Deputy Inspector Commission Cards were prepared for Bill Stephenson, Earl Brogg—employee of $\frac{1}{X}$ Ranch and Harold Shepard.

Contacted Inspectors Allen, Claude Foster, Gerald Cozby of the action we would take. Instructed Inspector Allen to make arrangements with Stephenson to impound the burros at Taylor Wells pens.

February 10

Inspector Allen informed me that plans were complete to gather the burros, Monday, February 11, P.M.

Mr. Garner requested my presence during the gathering, and to handle the impoundment and disposition of the burros as necessary.

February 11

Arriving at the $\frac{1}{X}$ Ranch, Monday, February 11, A.M., B. Stephenson and I traveled by jeep from head quarters to the pasture shown on allotment map toward Taylor Wells. During our journey I observed one lone burro (probably a Jack) about ⅓ distance up the range of mountains toward east boundary approximately 5 miles south of headquarters. About 3 miles further south I observed two head grazing (probably jennies) approximately ½ distance up hillside. Stopping at water tanks shown on map, I observed a few tracks at each well. As we approached Taylor Wells, and approximately 200 feet from road, I observed six head of burros.

In early afternoon the Inspectors named above arrived with horses and with assistance of B. Stephenson, Harold Shepard and two employees, nineteen head of burros (including the six near the road were gathered in the south and west area. It appeared that several head might be branded, however, after catching and restraining them by hand, no brands were found. We were unable to locate any more burros in the immediate area.

Subsequently I contacted Jerry Shaw at the Roswell Livestock Auction to inquire if he could handle the burros and place them in the sale, Monday, Febraury 18, if we could not determine ownership. Inspector Cozby contacted Leonard Baird, trucker, from Alamogordo, who was available this date to haul them to Roswell.

Upon arrival at Roswell Livestock Auction, the nineteen head were reinspected by Inspector Don Williams and found to be no brands.

A legal Notice of Estray and advertisement of sale was placed in the Alamogordo Daily News, February 14.

Sale of the burros was by public auction at Roswell Livestock Commission Co., Roswell on February 18. The proceeds (less trucking and sale expense) will be submitted to the New Mexico Livestock Board.

The following information was obtained from persons listed below who had knowledge of the burros in the Three Rivers area:

TOM RYAN —Former owner of Three Rivers (TR) Ranch
Purchased several loads of burros in El Paso in mid 1950's. Sold 103 head to Leonard Baird in July 1955. Turned several head out to pasture. Would round them up occasionally for "Kids" to ride. Enjoyed having them around (burros and kids).

HENRY VEGA —Carrizozo—Worked as truck driver in 1955
Hauled two loads of burros from El Paso to TR Ranch in 1955 or 1956.

AMADOR MARTINEZ—Rancher
Employed by Tom Ryan when burros were purchased. Branded several head 1963.

JIM RANDALL	—Former employee of Ryan Presently employed by new owner of TR Ranch, Charles Level. Helped brand burros 1963.
LEONARD BAIRD	—Trucker-Rancher, Alamogordo Purchased 103 burros from Ryan 1955. Shipped out of state. Believe Ryan kept approximately 25 head for ranch.

[PLAINTIFFS' EXHIBIT 6]

FOREST SERVICE MANUAL
TITLE 5300—TRESPASS

5333.48—Disposal of Impounded Livestock

MEMORANDUM OF UNDERSTANDING

NEW MEXICO LIVESTOCK BOARD

FOREST SERVICE
U.S. DEPARTMENT
OF AGRICULTURE

This Memorandum of Understanding made in duplicate this 3rd day of April 1969, by and between the New Mexico Livestock Board, hereinafter called the Board, and the United States Forest Service through the Regional Forester of Region 3, hereinafter called the Forest Service;

WHEREAS, the Board has been created under the laws of the State of New Mexico to provide an adequate system of control and regulation for livestock ownership, transportation, and disease prevention; and

WHEREAS, it is the mutual desire of the Board and the Forest Service to work in harmony for the common purpose of solving problems of estray and trespass animals in National Forests and National Grasslands in the State of New Mexico.

NOW, THEREFORE, the Board and the Forest Service mutually agree:

1. That unbranded or unmarked horses, mules, asses, cattle, sheep or goats impounded by the Forest Service on National Forests and National Grasslands will be turned over to the Board for disposal. The Board will reimburse the Forest Service for impoundment costs up to the net sale price of the animal(s). Amounts realized from the sale in excess of Forest Service costs will be retained by the State.

2. The Board will recognize the impoundment and sale procedures of branded horses, mules, asses, cattle, sheep or goats under Secretary of Agriculture's Regulation 36 CFR 261.13, provided that bills of sale are notarized or acknowledged in accord with New Mexico State Law.

3. That impounded swine of unknown ownership will be turned over to the Board for disposal in a manner similar to the procedure described in paragraph 1 above. Swine of known ownership will be disposed of by the Forest Service under the provisions of 36 CFR 261.13 as shown in paragraph 2 above.

4. That this Memorandum of Understanding supersedes and replaces similar memorandums dated September 16, 1964, between the Forest Service and the Cattle Sanitary Board of New Mexico and the Sheep Sanitary Board of New Mexico.

U.S. FOREST SERVICE

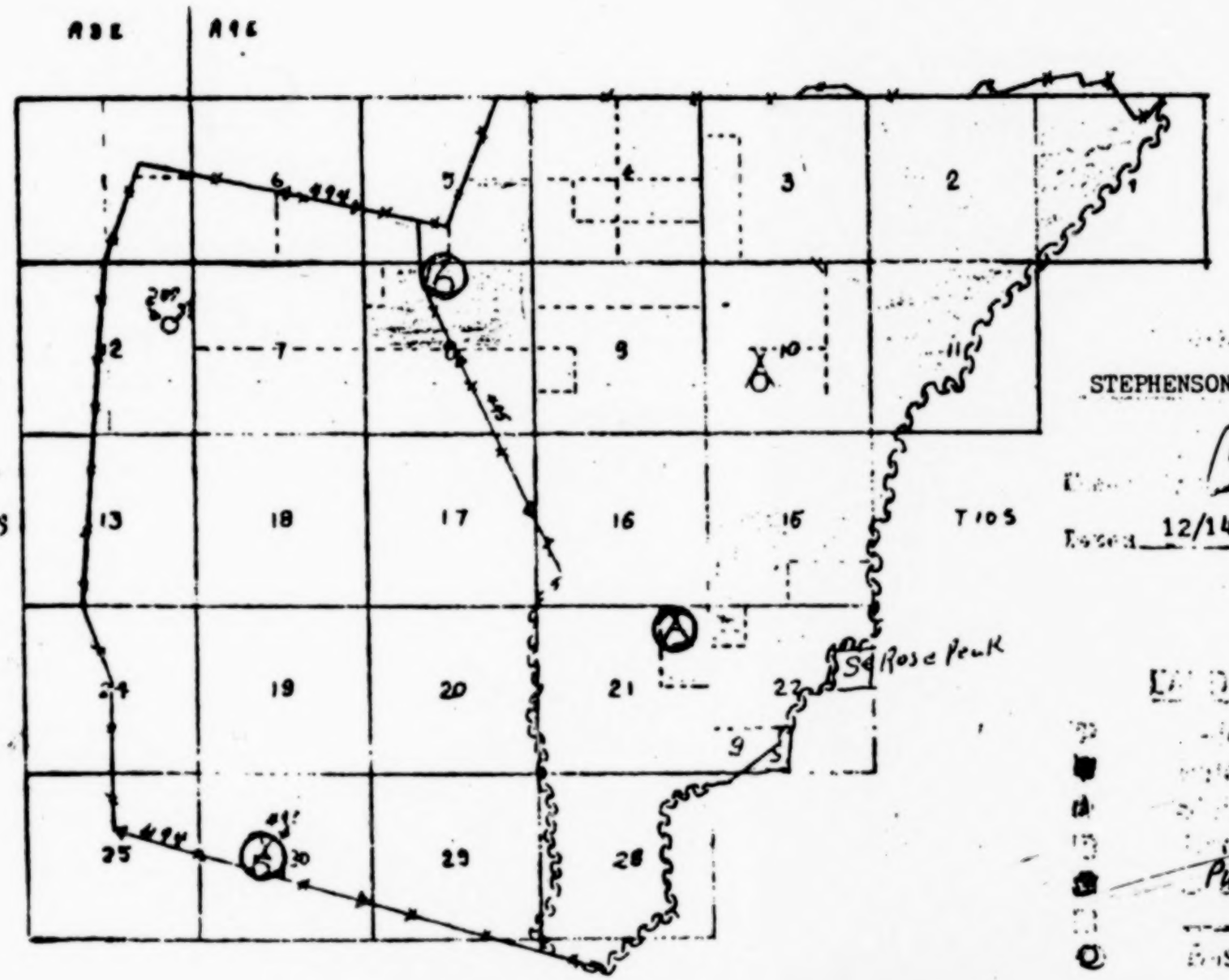
4/4/69 — /s/ Wm. D. Hurst
Date — Regional Forester

NEW MEXICO LIVESTOCK BOARD

4/16/69 — /s/ Lee S. Garner
Date — Director

4/16/69 — /s/ John L. Huning
Date — Chairman

[PLAINTIFFS' EXHIBIT 7]



STEPHENSON RANCH INC.

Charles D. Hodgson

Date 12/14/70 Title Area Mgr.

LAND STATUS LEGEND

- Forest Range
- Reserved Land
- State Land
- Unreserved Land
- PUBLIC WATER RESERVE
- Base Water

PLAINTIFF'S EXHIBIT 7

74-127 Civ

[PLAINTIFFS' EXHIBIT 12]

Bureau of Land Management
Santa Fe, New Mexico 87501
Kline—982-3801, Ext. 316
September 21, 1973
For Immediate Release

FEW WILD HORSES AND BURROS IN NEW MEXICO

Wild horses and burros are proving almost unknown on federal public lands in New Mexico.

Robert Buffington, acting state director for the Bureau of Land Management, said today that the claiming process for horses using BLM lands is at the half-way point without turning up positive evidence of wild horses or burros on BLM lands.

The claiming process, which began August 15, was set up under the Wild Horse and Burro Act of 1971, and is intended to protect and control wild and free-roaming horses and burros on lands under the administration of BLM and the Forest Service.

"We have held numerous meetings in all BLM districts in New Mexico," Buffington said. "We have met with our advisory boards, and with the general public in widely separated communities representing 13.6 million acres of BLM lands in New Mexico. In only one or two instances to date have animals been mentioned as possibly wild horses or burros. These animals are very few in number and there are doubts as to how wild they are. Some are believed to be geldings."

Buffington said some of the animals presently viewed as wild actually may be claimed by owners before the November 15, 1973 deadline.

"We are only half way through the claiming process," he said. "Animals claimed to date unquestionably belong to those who have claimed them, even though unbranded. For example, one rancher claimed an unbranded stallion and produced registration papers to prove ownership."

Buffington said his agency had checked out a report of an illegal "wild horse" roundup in the Las Cruces district. It consisted of a rancher gathering about seven ranch horses—six geldings and a stud—and selling them at auction.

"The state brand inspector looked at every one of them and verified that they were ranch horses," Buffington reported.

Under the claiming process, owners of horses using the public lands must submit claims of ownership prior to November 15, 1973. Unbranded and unclaimed horses remaining on the public lands after that date will, under the Act, be protected and managed as wild, free-roaming horses and burros.

* * * *

[DEFENDANT'S EXHIBIT A]

COOPERATIVE AGREEMENT

NEW MEXICO LIVESTOCK BOARD
FOREST SERVICE

U.S. DEPARTMENT OF AGRICULTURE
BUREAU OF LAND MANAGEMENT

U.S. DEPARTMENT OF THE INTERIOR

This Cooperative Agreement made August 7, 1973, by and between the New Mexico Livestock Board, herein after called the Board, the United States Forest Service through the Regional Forester of Region 3, responsible for administration of National Forests and National Grasslands, hereinafter called the Forest Service, and the Bureau of Land Management through the State Director, responsible for administration of National Resource Lands, hereinafter called the Bureau;

WHEREAS, the Board has been created under the laws of the State of New Mexico to provide an adequate system of control and regulation for livestock ownership, transportation, and disease prevention; and

WHEREAS, it is the desire of the Forest Service and the Bureau to effectively manage the wild free-roaming horses and burros located on National Forest System lands and National Resource lands, or that may wander from such lands; and

WHEREAS, it is the mutual desire of the Board, the Forest Service, and the Bureau to work in harmony for the common purpose of solving problems of estray and trespass animals in National Forest, National Grasslands, and National Resource lands in the State of New Mexico, NOW, THEREFORE, the Board, the Forest Service and the Bureau mutually agree:

A. *Estray Animals*—(This section applies to only those horses and burros which do not meet the definition of wild free-roaming horses and burros under section B 1.)

1. That unbranded or unmarked and branded of unknown ownership horses, mules, asses, cattle, sheep or goats impounded by the Forest Service or the Bureau on National Forest, National Grasslands, and National Resources lands will be turned over to the Board for disposal. The Board will reimburse the Forest Service or the Bureau, whichever is appropriate, for impoundment cost up to the net sale price of the animal(s). Amounts realized from the sale in excess of Forest Service or Bureau costs will be retained by the State.

2. The Board will recognize the impoundment and sale procedure of branded horses, mules, asses, cattle, sheep or goats "of unknown ownership" under Secretary of Agriculture's Regulations 36 CFR 261.13 and the Bureau's authority under 43 CFR 9239.3, provided that bills of sale are notarized or acknowledged in accord with New Mexico State law. All livestock sold under this section must be inspected as per the Board's regulation and the owner issued the necessary certificate upon removal of animal(s) from National Forest System lands or National Resource lands.

3. That impounded swine of unknown ownership will be turned over to the Board for disposal in a manner similar to the procedures described in paragraph 1 above. Swine of known ownership will be disposed of by the Forest Service or the Bureau under the provision of 36 CFR 261.13 or 43 CFR 9239.3 as shown in paragraph 2 above.

B. *Wild Free-Roaming Horses and Burros*

The Board will recognize the authority of the Forest Service and the Bureau under the Act of December 15, 1971 (P.L. 92-195) to manage and protect wild free-roaming horses and burros on National Forest System lands and National Resource lands or those that may wander from such lands. The Board, Forest Service, and

Bureau specifically agree to the following procedures in the administration of these regulations:

1. "Wild free-roaming horses and burros" shall mean all unbranded and unclaimed horses and burros that have used lands of the National Forest System or National Resource lands on or after December 15, 1971, or do hereafter use these lands as all or part of their habitat. Unbranded claimed horses and burros, where the claim is found to be erroneous, are also considered as wild and free-roaming if they meet the criteria above. However, this definition shall not include any horse(s) or burro(s) introduced onto National Forest System lands or National Resource lands on or after December 15, 1971, by accident, negligence, or willful disregard of private ownership.

2. The Forest Service and Bureau will recognize private ownership claims for unbranded horses and burros when fully supported by evidence in accord with State branding and estray laws. As a minimum, a claimant will provide:

a. A written claim submitted to the Bureau and/or the Forest Service.

b. A valid bill of sale as per New Mexico Statutes 1953, Sections 47-9-19 and 47-9-19.1 which fully describe the claimed animals, or

c. An inspection certificate issued by the Board for some previous occasion which clearly identified the animal(s) as belonging to the claimant, or

d. A brand exemption certificate for some previous occasion as required by rules and regulations of the Board.

3. The Forest Service and/or the Bureau and the Board will jointly evaluate ownership claims lacking approved supporting documents when said animals are on or have been known to come from National Forest System lands or National Resource lands where wild free-roaming horses and burros are known or suspected to exist. Where evidence is lacking for valid claims, the animals will come under the jurisdiction of the Forest Service and/or

the Bureau. Facts, such as, but not limited to the following, will be considered in determining ownership claim validity:

a. Affidavit signed by claimant indicating a willingness to defend title and setting forth the following: Number of animals and date animals were released upon the open range.
b. Evidence of payment of personal property tax upon the claimed animals.
c. Evidence of grazing license or permit for such animals.
d. Location of relevant private or leased lands.
e. Broken to a rope.
f. Broken to a saddle.
g. Gelded.
h. Mare of known private ownership with current progeny.
i. Have other marks such as tattoos, tags or man-created blemishes, clearly visible.

4. Wild, free-roaming horses and burros transported by driver or vehicle onto, within, or from National Forest System lands or National Resource lands will be done in accordance with rules and regulations of the Forest Service and/or the Bureau and the Board.

C. *Administrative*

1. *Restriction of Congressional Delegates or Resident Commissioner*

No member or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this agreement, or to any benefit which may arise therefrom.

2. *Discrimination*

All cooperative work under the provisions of this agreement or supplemental agreements or memorandums of understanding will be accomplished without discrimination against any person because of race, creed, color, sex, or national origin.

3. This cooperative agreement is effective on the date last entered below and supercedes and replaces similar memorandum dated April 3, 1969, between the Forest Service and the Cattle Sanitary Board of New Mexico. This cooperative agreement will be reviewed every two years, and can be terminated by any party upon 60 days written notice to the others.

NEW MEXICO LIVESTOCK BOARD

7/3/73 — /s/ LEE S. GARNER
Date — Director

FOREST SERVICE

7/2/73 — /s/ WM. D. HURST
Date — Regional Forester

BUREAU OF LAND MANAGEMENT

Aug. 7, 1973 — /s/ R. BUFFINGTON
Date — Acting State Director

[Caption omitted; filed March 7, 1975]

ORDER

This matter coming on for hearing upon the oral motion of the United States Attorney for the District of New Mexico for an order staying the judgment in this action pending further order of the Court, and the United States Attorney having given the Court his assurance that a formal motion for a stay will be filed within five (5) days hereof, and plaintiffs having no objection to the granting of a stay pending the filing of such a motion, and further providing that plaintiffs have an adequate opportunity to respond to such a motion for stay, and the Court being fully advised in the premises,

IT IS ORDERED that the judgment filed herein on February 28, 1975 be, and the same hereby it, stayed until further order of this Court.

_____
United States Circuit Judge

/s/ H. Vearle Payne
United States District Judge

/s/ E. J. Mechem
United States District Judge

Approved as to form:
/s/ G. J. Hopkins
Att'y for Plaintiffs

[Caption omitted; filed March 18, 1975]

MOTION TO STAY JUDGMENT PENDING APPEAL

Defendant(s) appearing by Victor R. Ortega, United States Attorney, District of New Mexico, and James B. Grant, Assistant United States Attorney, respectfully move the Court, pursuant to Rule 8, F.R. App. P., for a stay of the judgment entered by the District Court on February 28, 1975, a copy of which is attached.

Defendants Rogers C. B. Morton and the United States of America have heretofore moved this Court to alter or amend the judgment, under Rule 59(e) F.R.C.P., to delete the name of Victor R. Ortega, United States Attorney for the District of New Mexico as one of the named defendants as having been previously dismissed from this action and further to dismiss this action as to the United States of America for lack of jurisdiction over the subject matter. Notice of Appeal to the United States Supreme Court will be timely filed by the appropriate defendant after the Court's ruling upon said motion.

In support of the instant motion to stay the judgment pending appeal, defendant(s) attach hereto affidavits of James Gabettas, Acting District Manager, Boise District, BLM, and D. Dean Bibles, District Manager, Susanville District, BLM.

The attached affidavits substantiate the various reports received by the office of the United States Attorney since the Court's judgment issued on February 28, 1975 that the spoliation has begun and irreparable harm to the public interest is occurring and will continue to occur if this judgment is not stayed pending appeal. Grass on the public domain will grow again but the killing of each wild horse or burro is an irretrievable loss.

Congress has manifested its intent and policy to protect from capture, branding, harassment, or death all wild free-roaming horses and burros (16 USC § 1331) and assumed its Congressional enactment of a public law to facilitate and ensure that public policy was within its

constitutional authority. A division of opinion between this Court and that body should not work to militate against that policy until final disposition of the controversy by the Supreme Court.

Respectfully submitted,

VICTOR R. ORTEGA
United States Attorney

/s/ James B. Grant
Assistant U.S. Attorney

SUPREME COURT OF THE UNITED STATES

No. 74-1488

SECRETARY OF THE INTERIOR, APPELLANT

v.

NEW MEXICO ET AL.

Appeal from the United States District Court
for the District of New Mexico

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 6, 1975

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